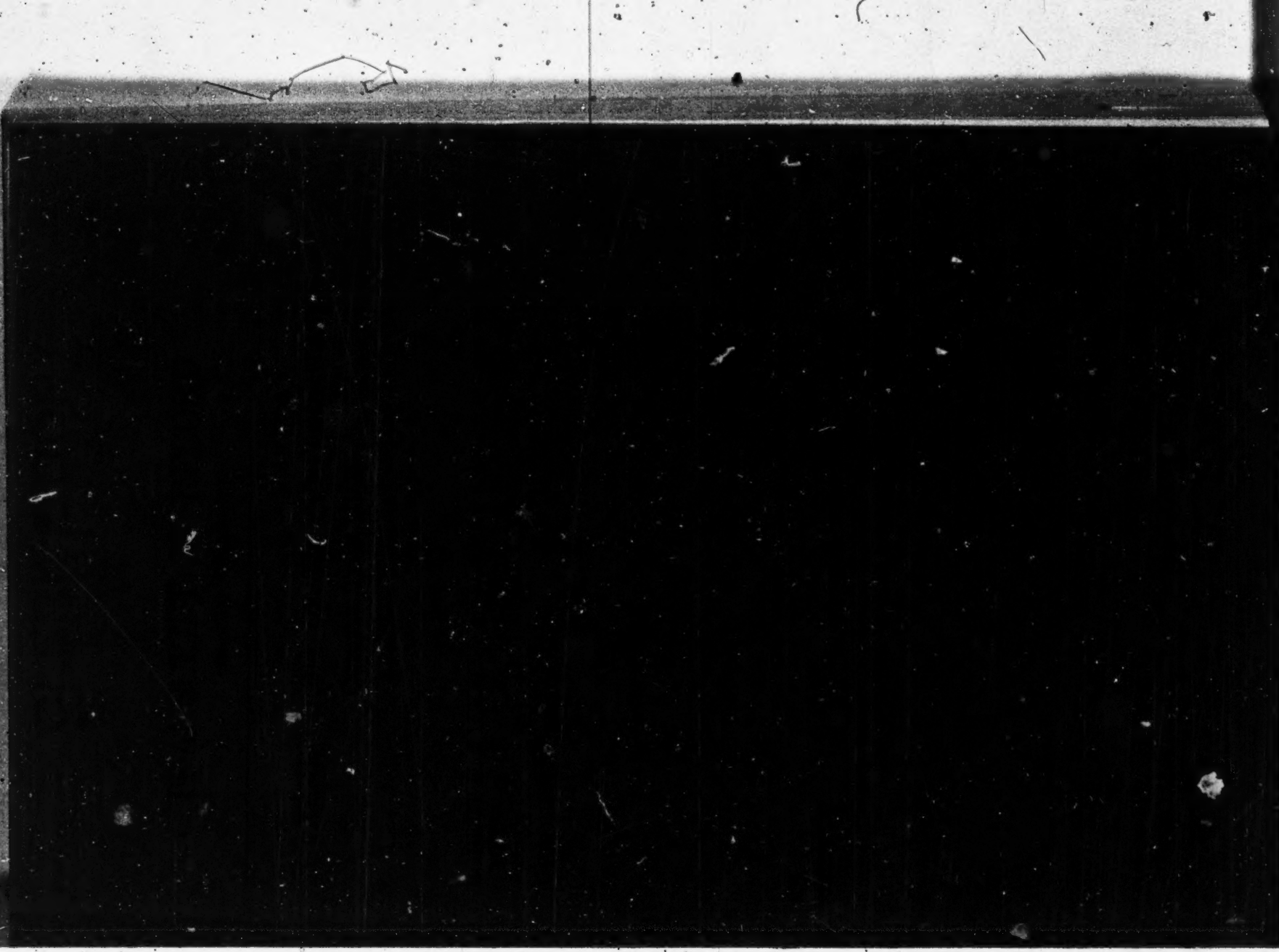

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

vs.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL EINKAUFS GESELLSCHAFT, m. b. H.,

Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of Hermann Sielcken, Deceased,

Intervenor in Proceeding to Vacate, Appellant, and Respondent on Cross-Appeal.

THE ATTORNEY-GENERAL OF THE UNITED STATES, on behalf of the United States and as successor to the Alien Property Custodian,

Respondent and Cross-Appellant.

THE UNITED STATES OF AMERICA,

Respondent.

JOHN S. SORENSON,

Defendant-Respondent.

RECORD ON APPEAL AND CROSS-APPEAL.

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Statement Under Rule XIII.

Original Title of Suit was:

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

against

HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

Equity No. 44-28.

The motion made in 1938 to vacate the decree of December 30th, 1929, was entitled solely in the original suit.

On the application of the Irving Trust Company, as Executor of the Estate of Hermann Sielcken, deceased, for leave to intervene in the proceedings to vacate the decree of 1929, there was added to the above title the sub-title: "In Proceedings to Vacate Final Decree of December 30, 1929." And on subsequent papers there was added to the original suit title the sub-title: "In Proceedings to Vacate Final Decree of December 30, 1929. IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken, deceased, Intervenor."

The original bill in the suit was filed on December 21, 1927.

On January 3, 1928, was filed subpoena *ad respondendum* to defendants White and Sutherland and the Marshal's return of service on them.

The names of the original parties were (as in the caption above):

Statement Under Rule XIII

John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, Plaintiffs,

and Howard Sutherland, as Alien Property Custodian, Frank White, as Treasurer of the United States, and Zentral-Einkaufs-Gesellschaft, m. b. H., Defendants.

The defendants Sutherland and White appeared and answered on January 23, 1928; their answer including a motion to dismiss.

Defendant Zentral-Einkaufs-Gesellschaft, m. b. H., filed its answer on September 6, 1929.

No defendant was arrested or bail taken or property attached or arrested.

The trial of the original suit was begun before Hon. Francis G. Caffey on December 20, 1929, and concluded before him on December 21, 1929.

No question was referred to a Commissioner or Commissioners, or Master or Referee.

No interlocutory decree was filed.

Final decree for the plaintiffs was signed by Judge Caffey on December 30, 1929, and filed January 2, 1930.

Warrant for satisfaction of decree in the amount of $727,618.93 was filed on April 12, 1930.

(The foregoing are the proceedings in the original suit.)

On September 9th, 1930, the plaintiff Thorleif S. B. Nielsen died.

On May 19th, 1938, notice of a motion by the United States, appearing by Lamar Hardy, United States Attorney for the Southern District of New York, to vacate the decree of December 30, 1929, addressed to John S. Sorenson and to the Chase National Bank as Ancillary Executor of Thorleif S. B. Nielsen, deceased, with accompanying affidavit of Frank C. Sterck, was served on John S. Sorenson and on the Chase National Bank as Ancillary Executor of Nielsen. Same was filed on January 30th, 1939. (This notice of motion was entitled merely in the original suit.)

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June 11th, 1938, John S. Sorenson appeared and filed his affidavit in answer to the motion.

June 10th, 1938, the Chase National Bank, appearing specially, made application as Ancillary Executor of Thorleif S. B. Nielsen to have the service of such notice of motion and affidavit upon it set aside, vacated and annulled.

June 16th, 1938, order was entered vacating and setting aside such service upon the Chase National Bank as such Ancillary Executor.

8 June 16th, 1938, the Irving Trust Company, as Executor of Hermann Sielcken, deceased, filed application for leave to intervene in the proceeding to vacate the decree, as one having an interest acquired under the decree of December 30, 1929, subsequent to its entry.

June 28th, 1938, order was entered granting leave to the Irving Trust Company, as Executor of Hermann Sielcken, deceased, so to intervene in the proceeding to vacate.

June 30th, 1938, the Irving Trust Company, as Executor of Hermann Sielcken, appeared as such Intervenor in the Proceeding to Vacate by Leonard B. Smith and Selden Bacon, Esqs., its attorneys.

9 August 15th, 1938, said Irving Trust Company, as such Executor, served and filed answering affidavits.

September 15th, 1938, replying affidavits were served by the United States, and filed on January 30th, 1939.

September 23, 1938, affidavits in rebuttal on behalf of the Irving Trust Company were served and filed.

October 10th, 1938, supplementary affidavit on behalf of the United States was served, and filed on January 30th, 1939.

October 26th, 1938, a second supplementary affidavit was served on behalf of the United States, and filed on October 26th, 1938.

January 30, 1939, further rebutting affidavits, served on October 21st, 1938, were filed on behalf of the Irving Trust Company as such executor.

October 11th, 1938, the motion to vacate the decree of December 30, 1929, was argued by the parties before Goddard, J.

October 26th, 1938, Francis J. McNamara, Esq., served

a notice of his appearance as Special Assistant to the Attorney-General of the United States of America, attorney for Homer S. Cummings, Attorney-General of the United States, on behalf of the United States and as successor to the Alien Property Custodian.

January 30th, 1939, the opinion of Goddard, J., granting motion to vacate, on grounds therein stated, was filed.

February 14th, 1939, Gregory F. Noonan, Esq., appeared as United States Attorney for the Southern District of New York as successor to Lamar Hardy, Esq., as
11 United States Attorney for that District.

March 9th, 1939, order was filed substituting Hon. Frank Murphy as Attorney-General and successor to the Alien Property Custodian, for his predecessor in office Hon. Homer S. Cummings.

April 7th, 1939, John T. Cahill, Esq., appeared as successor to Gregory F. Noonan, Esq., as United States Attorney for the Southern District of New York.

April 14th, 1939, order proposed on behalf of the United States, with notice of settlement, was presented, and such proposed order was filed in the Clerk's office on July 10th, 1939. Hearing was had before Judge God-
12 dard on settlement of the order later appealed from, Francis J. McNamara, Esq., arguing on behalf of the Attorney-General of the United States in support of the order proposed on its behalf, signature of which was refused.

April 28th, 1939, the order, signed by Judge Goddard, vacating decree of December 30, 1929, was entered and filed.

May 13th, 1939, notice of appeal by the Irving Trust Company, as Executor of Hermann Sielcken, deceased, to the United States Circuit Court of Appeals for the Second Circuit, from the order of April 28th, 1939, and bond for costs on such appeal, were filed.

May 23rd, 1939, there was filed notice of cross-appeal by Hon. Frank Murphy as Attorney-General of the United States and successor to the Alien Property Custodian on behalf of the United States to the Circuit Court of Appeals for the Second Circuit from so much of the order of April 28th, 1939, as failed to grant additional relief asked by the cross-appellant.

Notice of Motion to Vacate Final Decree. 13

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

Equity No. 44-28. 14

Sirs:

Please Take Notice that upon the affidavit of Frank C. Sterck, an attorney in the United States Department of Justice, and the exhibits attached thereto, verified the 18th day of May, 1938, the undersigned will move this Court at a term thereof for motions, to be held on the 3rd day of June, 1938, at Room 506, in the United 15 States Court House, in the Borough of Manhattan, City of New York, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order vacating the final decree entered in this cause on the 30th day of December, 1929, on the ground that said final decree is void because this Court was without jurisdiction to enter the same.

Please Take Further Notice that this notice of motion having been served upon you at least ten days before the hearing thereof, you are required, pursuant to Rule 64 of the Rules of Civil Practice of the State of New York, to serve upon the undersigned, at least

16 *Notice of Motion to Vacate Final Decree*

five days before such hearing, all affidavits to be used in answering the motion.

Dated, New York, N. Y., May 18th, 1938.

Yours, etc.,

LAMAR HARDY,
United States Attorney for the Southern District of New York, Attorney for United States.
Office & P. O. Address,
17 United States Court House, etc.

To:
Chase National Bank of the City of New York,
As Ancillary Administrator of the Estate of
Thorleif S. B. Nielsen,
18 Pine Street,
New York, N. Y.

John S. Sorenson, Esq.,
757 Carroll St.,
Brooklyn, N. Y.

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Affidavit of Frank C. Sterck, in Support of Motion.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.] Equity No. 44-28.

City of New York,
County of New York, ss:

Frank C. Sterck, being first duly sworn, deposes and says:

That he is an attorney in the United States Department of Justice;

That he has examined the pleadings and the decree in the United States District Court for the Southern District of New York in this cause and the files of the Department of Justice relating thereto;

That on the second day of June, 1913, Hermann Sielcken, John S. Sorenson, and Thorleif S. B. Nielsen, executed a partnership agreement for the purpose of continuing the business of the firm of Crossman & Sielcken, dealers in general merchandise, engaged in business in the City of New York under the firm name of "Crossman & Sielcken." Paragraphs Fifth and Eleventh of said partnership agreement, a copy of which is hereto annexed, marked Exhibit A, and made a part hereof, respectively read as follows:

"FIFTH: The capital of the partnership shall consist of all the property and assets of every kind and description belonging to the said Herman Sielcken, as surviving partner of the late firm of Crossman & Sielcken, or such part thereof as may be used in the business of the partnership now formed, including the goodwill of said firm. The whole of the said capital shall continue to be the property of the said party of the first part, and,

upon the termination of the partnership from whatever cause, the same shall belong, entirely and absolutely, to the party of the first part or to his estate. The parties of the second and third parts shall have no share or title in or to any of the said capital, their only interest in the business consisting of their shares of the net profits that may be realized therefrom.

"ELEVENTH: Upon the death of the party of the first part, it shall be the duty of the surviving partners to transfer and pay over to the executor of the will of the deceased partner his capital as above defined and also all the property and business of the firm."

Thereafter, on the 23rd day of March, 1914, the said Hermann Sielcken executed his Last Will and Testament in accordance with the law of New York, a copy of which is hereto annexed, marked Exhibit B, and made a part hereof, and in said Will the said Hermann Sielcken provided as follows:

"I also appoint the Columbia Knickerbocker Trust Company of the City of New York, Executor of this Will, for the purpose of collecting and converting into cash all my property situated in the United States of America, and I direct said Company to transmit and pay over all the net proceeds thereof to my said Executors in Germany for administration and distribution by them."

The second paragraph of the Will provided:

"Whereas, since the death of my late partner, George W. Crossman, in the firm name of Crossman & Sielcken, I have become the sole owner of the property and business of that firm and I have admitted into partnership John S. Sorenson and Thorlief S. B. Nielsen to continue the business of the said late firm under the same firm name; and the Articles of Co-partnership made between us,

bearing date the second day of June, 1913, provide that in case of my death the said partnership shall come to an end and that it shall then be the duty of the surviving partners to transfer and pay over to the executor of my Will all the capital, property and business of the said firm.

"It is my desire that my executor, the Columbia Knickerbocker Trust Company, should leave the management of the firm business for liquidation in the hands of the said Sorenson and Nielsen, to the largest possible degree, under the direct supervision of the said Trust Company. In such case, the said Sorenson and Nielsen shall each receive, as compension for their services in such liquidation, the sum of One thousand dollars ($1,000) a month, after my death, from the commencement of the liquidation to its end."

On the next day, the 24th day of March, 1914, Hermann Sielcken sailed for Baden-Baden, Germany, where he remained until the date of his death, October 8, 1917.

That on or about September 25, 1914, Hermann Sielcken in Germany entered into an agreement with the Reichseinkauf (Imperial Purchasing Agency) whereby his firm in New York, Crossman & Sielcken, would purchase goods in New York and ship same in vessels of neutral nations to Baltic seaports, consigned to neutral consignees. The Reichseinkauf agreed to pay the value of the cargoes c. i. f. Baltic ports (*i. e.*, in other words, the value of the invoice plus freight and insurance expense) and 10% commission on this value. This agreement follows:

"Agreement

"Berlin W. 8, September 25th, 1914.

"I herewith confirm to Your Honor, that the 'Reichseinkauf' (Imperial or Government Purchase) in Hamburg has been commissioned to receive, in Baltic seaports, mixed cargoes of wheat, tea, cocoa

and high concentrated animal food, which are shipped by vessels of neutral nations from American ports to neutral ports of the Baltic Sea; the value of each cargo amounting up to about 600,000 Marks. The 'Reichseinkauf' will for such cargoes, pay the value of the cargo C. I. F. Baltic seaport (*i. e.*, the value of the invoice plus' freight and insurance expenses) and 10% commission on this value. Payment to be made on the arrival of the goods and delivery of the bills of lading at the port of destination. This also refers to whole steamer cargoes of high concentrated animal food (oil cakes, cotton seed cakes, etc.).

"The confirmation can be cancelled by us at any time and expires of itself on the proclamation of peace. Cargoes, which are on their way, are in such cases to still be received, and also goods, which have been contracted for shipment, as well as goods, which have previously been purchased and ordered for the purposes of this contract.

(Signed) RICHTER."

The Zentral-Einkaufs-Gesellschaft (Central Purchasing Agency), hereinafter referred to as the Z. E. G., was organized in January, 1915, succeeding to and taking over all of the business assets and liabilities of the enterprise theretofore operated by the Reichseinkauf. The activities of the Z. E. G. and of Dr. Heinrich F. Albert as its representative are more fully described in an affidavit of Carl Heynen, its attorney in fact, dated April 25, 1925, a copy of which is hereto annexed, marked Exhibit C, and made a part hereof.

The Z.E.G. ceased to exist as a corporate entity and its assets passed over to the Imperial German Government by virtue of the publication of a declaration by the Reichsminister of Finance dated October 31, 1926, a copy of which is hereto annexed and marked Exhibit D, with a translation thereof marked Exhibit D-1. There is also annexed an Extract from the Commercial Regis-

ter marked Exhibit D-2, with a translation thereof marked Exhibit D-3, both said exhibits being made a part hereof.

With reference to the status of the Reichs Kredit Gesellschaft, mentioned in said Exhibit D, the files of the Finance Division, Bureau of Foreign and Domestic Commerce, Department of Commerce, for the year 1931 discloses an extract from "Memorandum on German Government's Subscription to Stock of German Banks" as follows:

> "The Reich also controls through the United Industrial Corporation, the Reichs-Kredit-Gesellschaft. 32
> The latter is the banking affiliate of the United Industrial Corporation which is a holding company for various enterprises controlled by the German Government."

The firm of Theodor Wille, Hamburg, Germany, had a one-half interest in goods purchased by Crossman & Sielcken in New York and shipped to Baltic seaports for the Reichseinkauf or its successor the Z. E. G., pursuant to the above agreement. This fact was brought to the attention of John S. Sorenson by Hermann Sielcken in a letter dated at Hamburg, Germany, September 22, 1914. A copy of said letter is hereto annexed, marked Exhibit 33
E and made a part hereof. The following is quoted from this letter from Mr. Sielcken to John S. Sorenson:

> "Don't forget it is necessary for us to remain owners of the cargo until the steamer arrives at destination, you have to swear as American citizens that we are the owners and we are until the cargo is paid for and delivered. I have some friends who receive a part of the profit and who are willing to take a risk on $125,000 a week, who will guarantee us to sell on arrival and who will pay us a profit of a sufficient amount, and we have nothing to do with the loss, if any occurs. You know I will not work for small profit—a difficult business; Wille share the risk with us."

The following is quoted from an affidavit of John S. Sorenson, dated October 26, 1927:

"Shortly after the outbreak of the war, in the summer of 1914, Mr. Sielcken communicated with us in New York to the effect he saw a market could be developed for American goods to be purchased and shipped by Crossman & Sielcken in New York and sent in neutral vessels to neutral ports, consigned to neutral consignees. In accordance with this suggestion, we received instructions from Mr. Sielcken to proceed to purchase and ship food and similar stuff for the joint account of Crossman & Sielcken and Theodor Wille, Hamburg. The shipments were consigned to Copenhagen concerns whose names were furnished us by Mr. Sielcken and in due course, shortly after the arrival of the vessel at Copenhagen, Crossman & Sielcken would be reimbursed for the invoice price of the merchandise plus freight and insurance and be paid a commission of 10% on the value of the cargo as indicated by the total amount of the invoice, freight and insurance. These payments, except as hereinafter noted came to us through Kuhn Loeb & Company or the National City Bank, both of New York City. This business was entered in certain Crossman & Sielcken ledgers known as Brazil Ledger J (page 710) and Brazil Ledger K (page 916), under the name 'Crossman & Sielcken, Copenhagen Joint Account.'" (See Exhibit U.)

Between November 13, 1914, and April 28, 1915, Crossman and Sielcken made twenty-one shipments to Baltic seaports, pursuant to the above agreement. Fourteen of these shipments arrived safely, and Crossman & Sielcken were reimbursed for the cargoes and paid their commission of 10%. The remaining seven shipments were seized by the British Naval Authorities and condemned in the British Prize Court. These shipments were as follows:

Steamship	Amt. of Invoice Freight and Ins.	Amount of Commission	Total
United States	$28,776.73	$2,877.67	$ 31,654.40
Hilding	95,578.29	9,557.83	105,136.12
Arkansas	48,686.81	4,868.68	53,555.49
Hellig Olav	28,105.99	2,810.60	30,916.59
Gunborg	43,997.16	4,399.72	48,396.88
Indianic	53,471.31	5,347.13	58,818.44
Oscar II	83,625.87	8,362.59	91,988.46
			$420,466.38 38
Less payment crackers and cereals on S. S. Oscar II		8,050.44	
S. S. United States		31,654.40	39,704.84
		Net Amount Due	$380,761.54

On or about December 27, 1917, the Z. E. G. and the Executors of the Estate of Hermann Sielcken in Germany agreed to allow a Court of Arbitration in Germany decide who should bear the risk of loss and whether or not these shipments were to be paid for by the Z. E. G.

On January 20, 1918, the Court of Arbitration of Hamburg, Germany, handed down a decision indicating that 39
the Z. E. G. was not liable on these shipments, but asked for some additional information. Before the additional information was furnished, attorneys for the Z. E. G. and attorneys for the Executors of the Estate of Hermann Sielcken in Germany arrived at a settlement, whereby Crossman & Sielcken were permitted to retain the $31,654.40 received from the Z. E. G. for the shipment on the S. S. United States. In this settlement the Executors of the Estate of Hermann Sielcken in Germany assumed the responsibility that the firm of Crossman & Sielcken and/or its liquidators or successors would recognize the compromise settlement; the Executors promised to save the Z. E. G. harmless against any possible claim which might later on be made by the firm of Crossman & Sielcken, and/or its successors or representatives, against the Z. E. G. for the six shipments

which the Z. E. G. was not obliged to pay the Estate of Hermann Sielcken in Germany for, under the compromise settlement. The Executors further promised to endeavor as far as possible to induce the firm of Crossman & Sielcken, and/or its liquidators or successors, to turn over to the Z. E. G. whatever they may have received or may receive from any other source for the cargoes of the S. S. United States.

After the declaration of war between United States and Germany and upon orders of the United States War Trade Board, Sorenson and Nielsen proceeded to liquidate
41 the firm of Crossman & Sielcken and on November 16, 1917, License No. ET-344 was issued to said Sorenson and Nielsen by the War Trade Board under the Trading with the Enemy Act requiring them, among other things, to turn over to the Alien Property Custodian the share of the enemy partner, Hermann Sielcken, in said firm of the proceeds in the liquidation. A copy of said License is hereto annexed, marked Exhibit F, and made a part hereof.

On November 30, 1917, the Alien Property Custodian appointed the Columbia Trust Company as his Agent to represent him in the liquidation of the firm. A copy of
42 the letter of appointment is hereto annexed, marked Exhibit G, and made a part hereof. On the same date the Columbia Trust Company accepted the appointment to act as Agent for the Alien Property Custodian in the liquidation of the firm of Crossman & Sielcken, a copy of said letter of acceptance being annexed hereto, marked Exhibit H, and made a part hereof. In accordance with such appointment the said Columbia Trust Company transmitted its first report as agent in such liquidation to the Alien Property Custodian under date of December 12, 1917, stating that the Columbia Trust Company, as Agent for the Alien Property Custodian, had taken possession of all of the assets, including accounts receivable, of the firm of Crossman & Sielcken, a copy of which is hereto annexed, marked Exhibit I, and made a part hereof.

On January 26, 1918, the Columbia Trust Company was appointed Executor of Hermann Sielcken, deceased, of Baden-Baden, Germany, according to the certificate of the Clerk of the Surrogate's Court, a copy of which, with a copy of the Letters Testamentary, is hereto annexed, marked Exhibit J, and made a part hereof.

On March 29, 1921, the Columbia Trust Company, as Executor of the Estate of Hermann Sielcken, deceased, filed Claim No. 5914, as amended, with the Alien Property Custodian seeking the return to it, as Executor, of all the right, title and interest of said Sielcken in the liquidation of the partnership of Crossman & Sielcken which had been theretofore acquired and seized by the Custodian. A copy of said claim is annexed hereto, marked Exhibit K, and made a part hereof.

On April 4, 1921, six days after the filing of said notice of claim, the Attorney-General allowed said claim in purported pursuance of Section 9 of the Trading with the Enemy Act, and ordered the return of certain cash as well as the release of all right, title and interest of the Alien Property Custodian in the interest of Hermann Sielcken in the liquidation of the partnership of Crossman and Sielcken and in the Estate of Hermann Sielcken, deceased, to the said Columbia Trust Company, as Executor.

On December 29, 1922, the Columbia Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken, filed a claim against Germany before the Mixed Claims Commission, United States and Germany, based on the same cargoes which were the subject of the instant cause of action. This claim is signed and sworn to by George E. Warren, Vice President of the Columbia Trust Company, and John S. Sorenson and Thorleif S. B. Nielsen, and asserts a "claim against the Government of Germany under the provisions of the Treaty between the United States and Germany of August 25, 1921, and the Agreement between the United States and Germany

of August 10, 1922, for the loss sustained by them as aforesaid in the sum of $190,133.05, being one-half of the total value of said merchandise ($380,266.09)." This claim alleges that the firm of Theodor Wille, composed of Gustav Diederichsen and Georg Georgius, both of whom were citizens and subjects of the Empire of Germany and who were engaged in business as wholesale merchants at Hamburg, Germany, hold equal undivided shares with Crossman & Sielcken in said cargoes and that the purchase, shipment and sale thereof was for their joint account as a joint adventure, as more particularly set forth in said claim. The claim further asserted:

> "V. That pursuant to the provisions of said agreement of co-partnership, upon the death of said Sielcken as aforesaid, said surviving partners Sorenson and Nielsen did transfer and pay over to said Columbia Trust Company, as executor as aforesaid, the said capital and also all the property and business of said firm; and that said Columbia Trust Company, as such executor, has ever since been and now is, engaged in liquidating the business of said partnership as if it had been carried on by said decedent in his sole name; and by reason of the foregoing, said Columbia Trust Company, as executor as aforesaid is entitled to collect and receive all the assets and credits of said firm of Crossman & Sielcken, and to prosecute and recover upon any and all causes of action and claims of whatever nature existing in favor of said firm at the time of its dissolution as aforesaid."

A copy of said claim is hereto annexed, marked Exhibit L, and made a part hereof. This claim before the Mixed Claims Commission was withdrawn on February 5, 1924.

On October 26, 1927, the American Exchange Irving Trust Company as successor to the Columbia Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of

Crossman & Sielcken, filed another claim against Germany and the Zentral-Einkaufs-Gesellschaft before the Mixed Claims Commission, United States and Germany, List No. 636, Docket No. 8305, for $380,761.54, for the recovery of the same cargoes which were the subject-matter of the instant cause of action. This claim is signed and sworn to by Orrin R. Judd, Vice President, American Exchange Irving Trust Company, and John S. Sorenson and Thorleif S. B. Nielsen, and a copy thereof is hereto annexed, marked Exhibit M, and made a part hereof. In this claim the claimants did not mention the fact that the firm of Theodor Wille, a firm composed of German nationals and having its principal place of business in Hamburg, Germany, had a one-half interest in this claim. The German Government, through its Agent before the Mixed Claims Commission, Carl von Lewinski, under date of October 15, 1928, filed an answer setting forth separate defenses to the claim, a copy of which answer is hereto annexed, marked Exhibit N, and made a part hereof. This claim was withdrawn from the Mixed Claims Commission in May of 1930 immediately upon the satisfaction of the decree entered in the instant cause in the District Court for the Southern District of New York.

On October 29, 1927, a notice of claim pursuant to Section 9 of the Trading with the Enemy Act, Claim No. 38530, Trust No. 592, was filed by the American Exchange Irving Trust Company (formerly known as Columbia Trust Company), John S. Sorenson and Thorleif S. B. Nielsen, making claim for a balance of $380,761.54, with interest, due claimants American Exchange Irving Trust Company (formerly known as Columbia Trust Company), executor of the Last Will and Testament of Hermann Sielcken, deceased, and claimants Sorenson and Nielsen, as liquidators of the firm of Crossman & Sielcken, an American co-partnership, composed of Hermann Sielcken, deceased, John S. Sorenson and Thorleif S. B. Nielsen. This claim was made for the recovery of the value of the same cargoes which were the subject-matter of the

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said claims before the Mixed Claims Commission, United States and Germany, and of the instant causes of action, and affecting property of the Zentral-Einkaufs-Gesellschaft m. b. H., Berlin, Germany, held by the Alien Property Custodian in Trust 592. A copy of said Claim No. 38530 is hereto annexed, marked Exhibit O, and made a part hereof. Said claim is made for a balance of $380,761.54, with interest, and sets forth that the American Exchange Irving Trust Company and Sorenson and Nielsen are citizens of the United States and that the
53 claimants are entitled to the payment of this debt claim under the provisions of Section 9 of the Trading with the Enemy Act, and that "no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the Trading with the Enemy Act: that the claim herein referred to is in all respects bona fide and that there are no set-offs, counterclaims or defenses except as herein stated." Said claim was filed by enclosing the same with a letter dated October 27, 1927, addressed to How-
54 ard Sutherland, Alien Property Custodian, signed by Barnes, Avery & Whiting, attorneys for claimants, a copy of which is hereto annexed, marked Exhibit P, and made a part hereof.

On November 12, 1927, a notice of claim pursuant to Section 9 of the Trading with the Enemy Act, Claim No. 38566, was filed by John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, a copy of which is hereto annexed, marked Exhibit Q and made a part hereof. This Claim 38566 is identical in both form and substance with Claim No. 38530, herein above referred to, except that the American Exchange Irving Trust Company (formerly known as Columbia Trust Company), Executor of the Last Will and Testament of Hermann Sielcken, deceased, is eliminated as a claimant. Said Claim No. 38566 is also for

a balance of $380,761.54, with interest, for the value of the said cargoes which were the subject-matter of the said claims before the Mixed Claims Commission, United States and Germany, and of the instant suit. Said Claim No. 38566 was transmitted by letter dated November 12, 1927, from R. S. Doyle of the firm of Hopkins, Starr, Hopkins & Hamel, lawyers of Washington, D. C., to the Honorable Howard Sutherland, Alien Property Custodian, Washington, D. C., a copy of which is hereto annexed, marked Exhibit R, and made a part hereof. Mr. R. S. Doyle was a member of the firm of Hopkins, Starr, 56
Hopkins & Hamel, who were associated with Messrs. Barnes, Avery & Whiting in the prosecution of both of these claims, as more particularly set forth in a letter dated November 21, 1929, from Hamel and Doyle, attorneys, Washington, D. C., to Mr. W. H. Pettry, Claims Division, Alien Property Custodian's office, Washington, D. C., a copy of which is hereto annexed, marked Exhibit S, and made a part hereof.

On November 16, 1927, the Alien Property Custodian and the Treasurer of the United States were served with a subpoena and bill of complaint in a suit in equity instituted in the United States District Court for the Southern District of New York, entitled: John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners 57
of the firm of Crossman & Sielcken, plaintiffs, against Howard Sutherland as Alien Property Custodian, Frank White as Treasurer of the United States, and Zentral-Einkaufs-Gesellschaft m. b. H., defendants. This case was numbered Equity No. 43-296 in the District Court of the United States for the Southern District of New York and was for the recovery of the value of the cargoes which were the subject-matter of the instant suit in the District Court of the United States for the Southern District of New York. On December 6, 1927, an order was filed, on consent, discontinuing said suit in equity without costs and without prejudice.

On December 23, 1927, the Alien Property Custodian and the Treasurer of the United States were served with

a subpoena and bill of complaint in the instant suit in equity instituted in the United States District Court for the Southern District of New York; upon trial thereof a final decree was entered on December 29, 1929, which was satisfied in full and a warrant for the satisfaction of the decree executed by Barnes and Avery on the 10th day of April, 1930, and filed on April 11, 1930, with the Clerk of the United States District Court for the Southern District of New York.

In 1932 Clara Sielcken Schwarz, as alleged residuary legatee under the Will of Hermann Sielcken (of which a copy is hereto annexed as Exhibit B), brought a petition in the Surrogate's Court for New York County against the Irving Trust Company (successor to the Columbia Trust Company), as Executor of Hermann Sielcken, in which she sought to set aside and vacate three decrees settling the accounts of the said Executor entered in 1921, 1922 and 1925. The said petition was referred by the Surrogate to Walter N. Seligsberg, Esquire, as Referee, who heard the evidence and reported his findings and conclusions to the Surrogate. In January of 1935 Brainard S. Avery, member of the firm of Barnes, Avery & Whiting, 100 Broadway, New York City, attorneys in the instant cause of action in the United States District Court for the Southern District of New York, testified as a witness, duly sworn before Referee Seligsberg. In a transcript of the testimony of Brainard S. Avery as reported by Thomas F. Falvey, Reporter, Surrogate's Court, New York County, the material parts of which are hereto annexed, marked Exhibit T and made a part hereof, in reference to the institution of the instant suit in the District Court of the United States for the Southern District of New York, Mr. Avery, having been duly sworn, testified as follows (Referee's Minutes, pages 1847 *et seq.*):

"Q. Whose idea was it to bring the suit in the District Court in the names of Sorenson & Nielsen without mentioning the executor or joining the executor as a party? A. I think it was mine.

"Q. What reason had you for proceeding in that way?

• • • • •

"A. I wanted to make the suit stick.

"Q. What had the omission of the executor from that suit to do with that matter?

• • • • •

"Q. In your judgment? A. At that time, all of 1927, I knew that Mr. Sielcken had died in an enemy country, that under the Trading with the Enemy Act he had an enemy status, that Mr. Sorenson and Mr. 62
Nielsen had no such obstacles to overcome, the executor not being in any better position than Mr. Sielcken himself. • • •

"Q. At the time you prepared that bill, you were familiar, were you not, both with the articles of co-partnership and the will? A. The bill was prepared in the first instance by Mr. Barnes, but we were both familiar with the papers."

The files of the Mixed Claims Commission, United States and Germany, disclose that on December 29, 1922, the Columbia Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and 63
John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken, filed a claim against Germany before the Mixed Claims Commission based on dollar and mark balances due Crossman & Sielcken from the firm of Theodor Wille, Hamburg, Germany. This claim was signed and sworn to by George E. Warren, Vice President of the Columbia Trust Company, and John S. Sorenson and Thorleif S. B. Nielsen, on December 29, 1922. This claim was in the amount of $158,134.73, and asserted:

"V. That pursuant to the provisions of said agreement of co-partnership, upon the death of said Sielcken as aforesaid, said surviving partners Sorenson and Nielsen did transfer and pay over to said

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Columbia Trust Company, as executor as aforesaid, the said capital and also all the property and business of said firm; and that said Columbia Trust Company, as such executor, has ever since been and now is, engaged in liquidating the business of said partnership as if it had been carried on by said decedent in his sole name; and by reason of the foregoing, said Columbia Trust Company, as executor as aforesaid is entitled to collect and receive all the assets and credits of said firm of Crossman &
65 Sielcken, and to prosecute and recover upon any and all causes of action and claims of whatever nature existing in favor of said firm at the time of its dissolution as aforesaid."

The claim was withdrawn on February 2, 1924.

On October 26, 1927, the American Exchange Irving Trust Company (formerly the Columbia Trust Company), as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken, filed a new claim against Germany and the firm of Theodor Wille before the Mixed Claims Commission, United States and Germany, List No. 6207,
66 Docket No. 8304, which said claim included the same debt as in the claim filed December 29, 1922, and a claim for 8,000,000 Marks, and also included therein an item of $177,104.48 which represented one-half of the loss on the cargoes which were seized by the British Naval Authorities in April, 1915, and condemned in the British Prize Court, which cargoes were the subject-matter of the instant suit in the United States District Court for the Southern District of New York. This one-half of the loss was the same one-half which was charged to Theodor Wille on the books of Crossman & Sielcken as a joint account, a copy of which account is hereto annexed, marked Exhibit U, and made a part hereof.

On November 16, 1929, H. H. Martin, counsel for the American Agent of the Mixed Claims Commission, wrote the following letter to Mr. Brainard Avery, member of the firm of Barnes, Avery & Whiting, New York City:

"Receipt is acknowledged of your letter of the 15th instant in relation to the Crossman & Sielcken claims, Docket Nos. 8304 and 8305.

"I note that Dr. Albert arrived in New York on the 12th instant and that on the 14th instant there was a conference in particular relation to the Z. E. G. claim between Messrs. Albert, Hays and Abramson, and Messrs. Barnes, Alger and yourself.

"I also note that Dr. von Lewinski is expected to arrive in New York on the 18th or at least some time next week and that after his arrival it is expected 68
that another conference will be had in relation to this matter.

"As I understand from your letter and from our conference on the 7th instant, the tentative negotiations for settlement of these claims will not have the the effect of withdrawing the Z. E. G. case from the U. S. District Court. As I have heretofore advised you, I feel that any tentative settlement that may be reached affecting the Z. E. G. claim, should be predicated on a finding of the United States Court; that a legal liability existed under the contract between the Z. E. G. and Crossman & Sielcken for the payment of 69
the merchandise involved in the Z. E. G. claim. I am sure that this is also Mr. Bonynge's view of the situation.

"Subject to the foregoing, I do not know of any reason why a settlement in the nature of a compromise of the two claims may not be reached between the parties, so that the two Agents may be in a position to join in a Stipulation recommending an award to the Commission.

"If it is desirable, I am certain that I could arrange to be up in New York next week for the purpose of taking part in the compromise negotiations. This is particularly true if Dr. von Lewinski desires to have someone from this Agency in a conference in which he is taking part."

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On January 9, 1930, Mr. H. H. Martin prepared the following memorandum concerning the proposed compromise settlement of this claim:

"Re: Claims of Crossman & Sielcken, Docket Nos. 8304 and 8305.

"Conference in relation to a proposed settlement of these claims was held this morning. There were present the following gentlemen:

The American Agent; the German Agent; Messrs.
71 Alger, Avery, Barnes and Doyle, of counsel for claimant; Mr. Abramson of the law firm of Arthur G. Hays, Esquire, of counsel for Z. E. G.; Dr. Roth of the staff of the German Agent, and myself.

"After a discussion was had of the Z. E. G. suit in which a judgment in favor of Plaintiffs in the amount of $716,160.37 with interest at the rate of 6% to date of payment was entered in the U. S. District Court for the Southern District of New York on the 30th ultimo in Equity No. E44-28, and a discussion of the connection between this suit that forms the subject-matter of claim, our Docket No. 8305, and a claim in-
72 volving the firm of Theodor Wille, Docket No. 8304, we had a general discussion as to the possibility of finally disposing of both claims.

"The matter of the Z. E. G. suit is somewhat complicated by the existence of the so-called indemnity Agreement under which the German Executors under the Will of Hermann Sielcken, two of whom were the principal partners of Theodor Wille, entered into an agreement with the Z. E. G. following certain arbitration proceedings held in Germany during the war. This Agreement provided in substance that if Crossman & Sielcken did not comply with the settlement supposedly reached in the arbitration proceedings and if they should bring suit in this country to recover moneys alleged to be due Crossman & Sielcken from Z. E. G., then the Estate of Herman Siel-

cken in Germany would reimburse Z. E. G. for any moneys recovered in the suit in this country against the Z. E. G.

"The effect of this Agreement if it is legally binding would be that the judgment obtained in the United States District Court on being collected by Crossman & Sielcken would in turn under the so-called Indemnity Agreement be reimbursed to Z. E. G. out of the Estate of Hermann Sielcken. The value of the Sielcken Estate in Germany is unquestionably in excess of the amount of the judgment recovered. 74
While there is a very serious question, particularly in view of the opinion of Dr. Neumann filed with this Commission, as to the legality of this Indemnity Agreement, nevertheless the Sielcken Estate is faced with a serious and long continued litigation in Germany. This liability unquestionably has a certain value and the Sielcken Estate would seem to be unquestionably justified in arriving at a settlement thereof.

"These facts were fully discussed and the German Agent was clearly given to understand that any settlement that might be negotiated would be on the basis 75
of disposing of all phases of both the Z. E. G. matter and the Theodor Wille matter.

"With these preliminaries cleared away, considerable discussion was then had as to a basis for the settlement of the so-called Wille claim. The German Agent was advised that in so far as the American Agency was concerned it was not interested in the settlement between claimants and the Z. E. G. under this Indemnity Agreement, such settlement being a matter that should be arranged for solely between the interested parties. In this position the German Agent said he fully concurred. Mr. Barnes then said that the Department of Justice through Mr. Rhodes was fully advised as to the possible settlement between Z. E. G. and the liability of the Sielcken Estate under the Indemnity Agreement.

"In the discussion of the Wille claim, it was developed that as a basis for settlement, we could consider that the several accounts between Crossman & Sielcken and Theodor Wille are about balanced with the exception of the so-called bond account, so that the real sound basis for the claim is one against the Government of Germany for depreciation in bonds. In taking this position however it was made clear that neither the American Agent nor the claimants, in case no agreement could be reached, have in any sense receded from their position that in so far as the so-called bond item of the claim is concerned, it is either a claim for depreciation in bonds by reason of the exceptional war measures or else it is a debt claim against Theodor Wille for the reason that there is no definite evidence that the firm of Wille purchased the bonds involved until some time after the Armistice, having in the meantime used the moneys of Crossman & Sielcken for their own benefit. On this phase of the claim if it is to go before the Commission, the American Agent would contend that there was a debt claim as distinguished from a bond claim.

"The bond feature of the claim it was explained involves bonds to a value in excess of M. 6,000,000, is based on the theory that Hermann Sielcken who died in Germany in October, 1917, left a will under which he provided that the business of his firm, Crossman & Sielcken was to be promptly liquidated and the assets distributed in accordance with the Articles of Co-Partnership. In this situation there was an obligation on the part of the firm of Wille to promptly transmit the property of Crossman & Sielcken that it was holding to New York for use in the liquidation of the New York firm. This duty was prevented from being fulfilled by the exceptional war measures of Germany and instead of the money and bonds being sent over promptly following the death of Hermann Sielcken, they were collected together and reported to the Treuhander in March, 1918, and remained under

his control and direction until they were finally turned over in the latter part of 1921. On the theory that when the property was reported to the Treuhander it would as a matter of fact, had there been no war, have been sent over to New York, the least that we would be entitled to receive is the depreciation in the value of this property between March, 1918 and January, 1920, representing the depreciation on this basis of 17¢ plus.

"On this basis our claim on the bond item amounts to $1,117,655.00 damages for depreciation. This is 80
likewise substantially the amount that we would be entitled to recover if the claim were presented on the basis of a debt from Wille based on his use of the money and failure to invest in bonds for the account of Crossman & Sielcken until some time after the war, which situation we insisted might be developed through an audit of the Wille books.

"'After some further discussion of the matter, the German Agent said that he would, before taking a definite position, like to discuss the subject-matter of both claims with his counsel, and with Mr. Abramson. These three gentlemen thereupon withdrew. 81

"In the course of about a half-hour they returned and the conference was continued. After some preliminary discussions to clear up with the German Agent the basis of our item of $1,117,655, he said that while he was not authorized to settle the claims at this time, he would nevertheless recommend to Berlin that he be given authority to settle this Wille claim on the basis of 60% of the amount named above, together with interest thereon at 5% from April 1, 1918, this to be conditioned on a settlement between the Sielcken Estate and the Z. E. G. of the liability of the Sielcken Estate under the Indemnity Agreement above referred to.

"Settlement on this basis was acceptable to claimants with the understanding that claimants and Mr.

Abramson were to meet this afternoon with a view to arriving at a settlement under the so-called Indemnity Agreement. As soon as the basis of such settlement is worked out, the German Agent is to be advised and he will then write to Berlin the full details of the claims and recommend that he be given authority to finally consummate the settlement.

"Mr. Avery said that he had the verbal authority from the heirs of Hermann Sielcken authorizing him to settle on the basis about outlined, but that he would
83 like to have a confirmation thereof in writing. He thereafter asked as to the advisability of cabling the Sielckens for definite authority to settle. It was, however, suggested that under the circumstances, he postpone any further communications with the Sielcken heirs until the German Agent receives instructions from Berlin to proceed further. This arrangement was satisfactory to all parties.

"The German Agent said that it would take about three weeks before he could hear from Berlin, but that he would request instructions be cabled.

"Settlement on this basis will mean that in the Z. E.
84 G. case Mr. Hays as attorney for the Z. E. G. will advise the Department of Justice that he does not care to proceed further with an appeal. This will mean that the judgment of the District Court may then be satisfied out of funds in the possession of the A. P. C.

"The Z. E. G. claim before the Commission, Docket No. 8305, will then be withdrawn.

"In the Theodor Wille claim, Docket No. 8304, that will on an Agreed Statement recover an award of $670,593.00 together with interest at 5% from April 1, 1918, against the German Government on account of damages arising out of the application to the bonds in the possession of the firm of Theodor Wille of exceptional war measures, the German Agent is

to advise us promptly as to the instructions he receives from Germany.

"Settlement of the Wille claim on the basis above outlined will mean that the value of the award as of the present time will be say $1,052,663.37. In addition, claimants will receive under the judgment in the District Court $716,160.37 as of December 30, 1929, less such an amount as may be agreed upon between claimants and the Z. E. G. in satisfaction of whatever rights Z. E. G. may have against the Estate of Sielcken under the Indemnity Agreement."

On March 17, 1930, Mr. H. H. Martin prepared the following memorandum concerning a new proposed compromise settlement of this claim, which reads as follows:

"Re: Claims of Crossman & Sielcken, Docket Nos. 8304 and 8305.

"Reference is made to my memorandum in relation to these claims dated January 9, 1930, covering conference re proposed settlement thereof.

"The German Agent advised me this morning that he was in receipt of instructions from Berlin to the effect that the proposed settlement of these claims as reached at our conference on January 9, 1930, and recommended by him to Berlin was not acceptable to his Government but that he had authority to further discuss the questions involved, with a view to arriving at a settlement that would be acceptable to his Government.

"The German Agent further suggested that Mr. Hayes and Mr. Abramson, of counsel for the Z. E. G., were in Washington and that he understood that Mr. Avery, of counsel for claimants, was also in the City. He said that he would be glad to have a conference this afternoon.

"In accordance with the foregoing, arrangements were made to hold the conference at 2:30 P. M. this

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day. At this conference there were present the German Agent, Messrs. Alger, Avery, Barnes and Doyle, of counsel for the claimant, Messrs. Hayes and Abramson, of counsel for the Z. E. G., Dr. Roth, of the staff of the German Agent, and myself.

"The conference was opened with the statement from the German Agent that the recommendation for settlement arrived at had been rejected by the Foreign Office. This office raised two principal objections thereto, (1) that in the settlement of January
89 9, 1930, a rate of exchange on depreciation in bonds had been taken at a materially higher rate than had heretofore been allowed in any claim by the Commission; (2) that the proposed basis of settlement, namely, 60% of the original claim as arrived at in the settlement of January 9, 1930, was too high.

"The German Agent pointed out that the rate of exchange from March, 1918, 19.2 cents, was almost the peak of exchange following the entry of this country into the war; that the usual rate adopted by the Commission in these bond claims was the rate for November, 1917, 14.4 cents.

90 "The German Agent said that under his instructions the best offer he could make was 50% instead of 60% of the original amount of the bond claim, with interest from April 1, 1918; that if this was not acceptable to the claimants, it would mean that the claim would have to be settled by the Commission and that he would then make the contention that the most claimants were entitled to recover was on the basis of the rate of exchange for November, 1917.

"The German Agent having made this statement suggested that he and his counsel, together with Messrs. Hayes and Abramson would withdraw from the conference in order that attorneys for claimants might be free to discuss the matters involved, with this Agency.

"After the withdrawal of these gentlemen considerable discussion was had on the questions involved. It was pointed out that the proposed settlement reached January 9, 1930, was based on a total amount of damages arising out of the bonds involved in the Wille claim of $1,117,655.71, together with interest thereon from varying dates. This item is made up of the following:

(1) $1,062,715.31, with interest at 5% from March 24, 1918, covering the M. 6,000,000 odd bonds involved; 92

(2) $16,990.40, with interest at 5% from November 1, 1918, involving a portion of the Peiman-Zeigler securities;

(3) $37,950.00, with interest at 5% from June 30, 1919, involving the remainder of the Peiman-Zeigler securities.

"In the settlement of January 9, 1930, the German Agent agreed to recommend that he be authorized to make settlement on the basis of 60% of the above amount with interest at 5% from April 1, 1918. This implied an award of $670,593.43, with interest at 5% 93 from April 1, 1918.

"The settlement as now proposed on the 50% basis implies an award of $558,827.85.

"After considerable discussion the attorneys for claimants reached the conclusion that they would accept the revised offer of the German Agent with the understanding that claimants are furnished with a general release by the firm of Theodor Wille covering claims that this firm may have against them, particularly arising out of the Z. E. G. transactions.

"After reaching this conclusion, we again conferred with the German Agent and his counsel, Messrs. Hays and Abramson being present, and advised the German Agent that subject to approval of

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claimants, the attorneys would accept the revised offer.

"In order to make it a matter of record, the German Agent is to write us a letter informing us that his recommendation of January 9, 1930, was not approved by his Government but that he would make an offer to settle on the basis of an award of $558,827.85, with interest at 5% from April 1, 1918, covering the so-called Wille claim, and that a general release would be given by Wille to claimants."

95 On March 24, 1930, Arthur Garfield Hays, attorney for the Zentral-Einkaufs-Gesellschaft, wrote to the Honorable, The Attorney-General, Washington, D. C., Attention: Mr. Rhodes, advising that the Zentral-Einkaufs-Gesellschaft would not take an appeal from the decree. A copy of said letter is hereto annexed, marked Exhibit V, and made a part hereof.

As a result of the compromise settlement consummated on March 17, 1930, whereby the claim before the Mixed Claims Commission would be settled on the basis of 50%, a stipulation was presented to the Mixed Claims Commission, United States and Germany, and based thereon
96 on April 21, 1930, an award was entered in favor of the claimants whereby the Government of Germany was obliged to pay to the Government of the United States on behalf of the claimants, and the Government of the United States would pay to the claimants out of the German Special Deposit Account the sum of $558,827.85, together with interest thereon at the rate of 5% per annum from April 1, 1918, to the date of payment.

The distribution of the proceeds of the award of the Mixed Claims Commission and of the amounts received in satisfaction of the decree entered by this Court in the instant suit in the Southern District of New York is set forth in two letters, the first dated March 27, 1930, from Earl B. Barnes and Brainard Avery to Arthur Garfield Hays, Esquire, 43 Exchange Place, New York City, a copy of which is hereto annexed, marked Exhibit W, and

made a part hereof, which contains the following endorsement at the end thereof: "The foregoing is in accord with my understanding of the terms of settlement hereinabove described: (S) Arthur Garfield Hays, Zentral Einkaufsgesellschaft, by Arthur Garfield Hays, Attorney in Fact," and also endorsed at the end thereof, as follows: "New York, 100 Broadway, March 27, 1930, To Messrs. Brainard Avery and Earl B. Barnes. You are hereby authorized and directed to sign and deliver the foregoing letter. (S) Clara Sielcken Schwarz, by (S) Alex Wendroth Sielcken, Attorney in Fact," and further endorsed: 98
"Approved, Irving Trust Company, by (S) Orrin R. Judd, Vice President, as Executor of the Will of Hermann Sielcken, deceased."

On April 17, 1930, a letter from O. R. Judd, Vice President of the Irving Trust Company of New York, to Leonard B. Smith, Esq., 128 Broadway, New York City, attorney for the Irving Trust Company of New York, with the notation that a copy was sent to Mr. Avery, of the firm of Barnes, Avery & Whiting, attorneys for the plaintiff, and a copy to Mr. Hotchkiss, of the firm of Davies, Auerbach & Cornell, attorneys for the Irving Trust Company, sets forth that the plaintiff Sorenson was demanding possession of the funds from his attorney, 99
and states:

> "Mr. Avery having made the suggestion that he thought Mr. Hotchkiss would be very helpful in getting the money and securities paid over to the Estate, avoiding the danger of threatened litigation and consequent delay, conferred with Mr. Hotchkiss and on April 10th Mr. Hotchkiss cabled Mrs. Schwarz as follows:
>
> > "'For the protection of the late recoveries Avery suggests that he be retained as counsel by Irving as executor and for me to be associated with him in that retainer stop Averys attitude is that his prior retainer will be fulfilled when all moneys are received and his thought is that they

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should be paid to Irving without passing through the hands of Sorenson liquidator who is now demanding possession of the funds stop Irving undoubtedly will retain Avery and myself if you request stop Will this interfere with Leonard Smiths relations to you or the Irving stop Confer with Alex cable answer.' "

Copy of the above letter is hereto annexed, marked Exhibit X, and made a part hereof.

101 The second letter, dated April 24, 1930, addressed to Messrs. Crossman & Sielcken in Liquidation, Mr. John S. Sorenson and Mr. Thorleif S. B. Nielsen, Liquidators, signed by Brainard Avery, a copy of which is hereto annexed, marked Exhibit Y, and made a part hereof, reports the proceedings at the Irving Trust Company and sets forth the distribution of the proceeds of the instant suit in the Southern District of New York and the proceeds of the award to the claimants before the Mixed Claims Commission, United States and Germany.

The testimony of Brainard S. Avery in the proceedings before Referee Walter N. Seligsberg, annexed hereto and marked Exhibit T, sets forth in detail the facts sur-
102 rounding the filing of the claims with the Alien Property Custodian and the institution of the instant suit in this Court; the institution and filing of the Memorial of the claimants before the Mixed Claims Commission, United States and Germany; the agreement made with the representatives of the German Foreign Office in Berlin in March of 1928; the arrangement that the Z. E. G. default or enter an appearance and submit to the jurisdiction of this Court as a respondent in this action; the filing of an answer by the defendant Zentral-Einkaufs-Gesellschaft m. b. H.; the trial of this cause before the Honorable Francis G. Caffey, United States District Judge for the Southern District of New York; the entry of the decree in December of 1929; the presence of Mr. Orrin R. Judd, Vice President of the Irving Trust Company, at the trial; the arrival in January of 1930 of

the German Agent, von Lewinski; and the meetings in Washington at different times leading up to the performance of the tentative agreement arrived at in Berlin in April of 1928. Particular reference is made to the testimony of Mr. Avery on pages 1661, 1662 and 1663 of Exhibit T, testimony of Brainard S. Avery before Walter N. Seligsberg, Referee, "Dr. von Lewinski said that he remembered that the judgment of Solomon had been agreed to in Berlin of dividing the baby," and further, "Von Lewinski's reply was that he thought he had a gentlemen's agreement, but he was not certain what a 104
gentlemen's agreement with a lady meant. Finally, it went through exactly as it was arranged in Berlin," and further:

"Referee: There had been an agreement then, in Berlin on an amount of Marks that was due somebody over here?

"Witness: Not quite. The agreement was that right straight through there should be an even division, even extending to the moneys in possession of the A. P. C.

"Referee: Even division between whom? That is what I cannot get into my head. 105

"Witness: The estate was to take one-half and the Germans were to get the other half, or to be released from the other half of the—

"Referee: In other words, there was to be an agreement on the claim, and the German Government was claiming either 60 per cent or 50 per cent?

"Witness: Or to receive 50 per cent, because they received one-half of this Z. E. G. money which came from the A. P. C., and they paid one-half of the settlement which was necessary to make with the house of Theodor Wille."

Thorleif S. B. Nielsen died in September, 1930, and the Chase National Bank of the City of New York, as Ancillary Executor of the Last Will and Testament of Thorleif S. B. Nielsen, deceased, brought an action

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against John S. Sorenson, Irving Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, Clara Sielcken Schwarz, and others, who were not served and all other persons who have or claim to have any interest whatever in the assets of Crossman & Sielcken, which persons, if any there be, and the names thereof, are unknown to the plaintiff, in which suit a judgment was entered in the New York Supreme Court for the County of New York on the 11th day of November, 1933, upon the report of Referee
107 Henry F. Wolff, Esquire, duly appointed by the New York Supreme Court for the County of New York. A copy of said judgment is hereto annexed, marked Exhibit Z, and made a part hereof, and particular attention is called to the following extract therefrom:

"Now, on motion of Avery & Whiting, attorneys for said defendant, Clara Sielcken-Schwarz, it is

"Adjudged that upon the death of said Hermann Sielcken on October 8th, 1917, by virtue of the terms of a certain partnership agreement dated June 2nd, 1913 (a copy of which is attached to the complaint herein), between said Sielcken and said John S.
108 Sorenson and said Thorleif S. B. Nielsen and by virtue of the terms of said Sielcken's will dated March 23rd, 1914, and admitted to probate by the Surrogate's Court of the County of New York on the 26th day of January, 1918, the sole right to liquidate the partnership assets and property of the firm of Crossman & Sielcken was vested in the executor named in said will, now said defendant, Irving Trust Company, and under the terms of said instruments no other person was lawfully entitled to be such liquidator. It is further

"Adjudged that neither the plaintiff's testator, Thorleif S. B. Neilsen, nor said defendant, John S. Sorenson, is now or at any time since the dissolution of said firm of Crossman & Sielcken by the said

death of said Hermann Sielcken on October 8th, 1917, has been a liquidating partner thereof."

The files of the Supreme Court, New York County, further disclosed that the final judgment was entered in said case, Index No. 28047 1931, on November 8, 1937, upon the judgment entered therein on the 11th day of November, 1933, a copy of which final judgment is hereto annexed, marked Exhibit AA, and made a part hereof. Copies of the releases executed by the said Nielsen and the said Sorenson, dated December 22, 1917, are hereto annexed, marked Exhibits BB and CC and made a part 110 hereof.

The files of the Surrogate's Court for the County of New York disclose that on December 13, 1937, in the matter of the Judicial Settlement of the Account of the proceedings of the Irving Trust Company, as Executor of Hermann Sielcken, deceased, an Intermediate Account of Proceedings of the Executor to December 1, 1937, was filed by the Irving Trust Company, as Executor of Hermann Sielcken, deceased, by John F. McIlwain, Assistant Secretary, and annexed thereto Schedules A to K contain the information required by Rule 10, Subdivision 7, Rules of the Surrogate's Court, New York County. On page 53 111 of said account, Schedule I, page 2, is set forth the following:

"In May, 1927, subsequent to the rendition of the voluntary account and its approval by her, the sole residuary legatee, Clara Sielcken Schwarz, then the only person interested in the estate, other than this Executor, announced that she had discovered certain additional assets of the firm of Crossman & Sielcken, which had been until then wholly unknown to this executor and which were not shown on the firm books or in its files, consisting of two certain claims (which she asserted belonged to the former firm of Crossman & Sielcken, of whose assets the decedent's estate was then the sole owner) all evidences of which were in Germany, one against the Zentral

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Einkaufs Gesellschaft, a German governmental corporation, and the other against the firm of Theodor Wille of Hamburg, Germany.

"Without revealing to the Executor the exact nature of these claims, Mrs. Sielcken Schwarz then arranged with the Executor, which then held no funds available for that purpose, that she would prosecute these claims in its name (or otherwise as she might be advised), at her own cost and by such attorneys as she might employ for that purpose.

113 "Pursuant to this arrangement she, about November, 1927, brought a suit in the United States District Court for the Southern District of New York in the names of Thorleif S. B. Nielsen and John S. Sorenson, as surviving members of the said former firm of Crossman & Sielcken against said Zentral Einkaufs-Gesellschaft, and the Alien Property Custodian and the Treasurer of the United States (which two officials then held very large sums belonging to said Zentral Einkaufs-Gesellschaft), and on the 30th day of December, 1929, obtained and entered a decree of that Court in that suit awarding to the

114 plaintiffs therein (Sorenson and Nielsen as surviving partners of Crossman & Sielcken) the sum of $716,160.37 against said Zentral Einkaufs-Gesellschaft, and directing that it be paid by the defendants Alien Property Custodian and Treasurer out of property of said Zentral Einkaufs-Gesellschaft in their hands.

"Concurrently with that suit, she had instituted a proceeding before the Mixed Claims Commission—United States and Germany, against Germany and the Zentral Einkaufs Gesellschaft, in the joint names of Sorenson, Neilsen and this executor, upon the same claim that was set up in the District Court suit. This proceeding was withdrawn as part of the 1930 compromise described below.

"About the same time that she began those proceedings she also instituted a proceeding before the Mixed Claims Commission—United States and Germany, in the joint names of said Nielsen, said Sorenson and this Executor (as the sole persons interested in the claim), against Germany and the firm of Theodor Wille of Hamburg, Germany, to recover several millions of dollars.

"In the spring of 1930, the time to appeal from the said decree of the United States District Court had not expired, and there was most serious question 116
whether it was not reversible for error as to the right of Sorenson and Nielsen to maintain the suit as plaintiffs; and the claims against Germany and the firm of Theodor Wille were being disputed; the said Clara Sielcken Schwarz, then, with the approval of this executor, on March 27, 1930, entered into a compromise of all these three claims, by which no appeal should be taken from the said decree of the United States District Court; and that judgment should be paid, and the claim before the Mixed Claims Commission—United States and Germany, against Germany and the Zentral Einkaufs Gesell- 117
schaft should be discontinued and dropped; and in addition an award should be made by the said Mixed Claims Commission on the claims before it against Germany and the firm of Theodor Wille, to the said claimants before it, of the sum of $558,827.85 and interest thereon at 5 per cent per annum from April 1, 1918. Such award was accordingly made by the Mixed Claims Commission—United States and Germany, to said Nielsen, said Sorenson and this executor on April 21, 1930.

"By the terms of that compromise it was further provided that one-half of the sum recovered under that District Court decree should be paid over by the plaintiffs in that suit to the Zentral Einkaufs Gesellschaft, and that $50,000 additional should be paid,

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out of their half of that recovery, by the plaintiffs, to the firm of Theodor Wille; and that an expense of $200 connected with the transfer from Washington to New York of the United States Treasury 3½ per cent notes received in part payment of that decree, should be shared $100 by the plaintiffs in that suit and $100 by the said Zentral Einkaufs Gesellschaft.

"A true and correct copy of such compromise agreement is hereto annexed marked Exhibit A and hereby made a part of this Schedule I.

119 "In accordance with such compromise agreement, full payment of the sum awarded by said District Court decree and accruing interest thereon from the date of the decree was made in April, 1930, to Thorleif S. B. Nielsen and John S. Sorenson as surviving members of Crossman & Sielcken (the plaintiffs in that suit), as follows:

"In United States Treasury 3½% Notes	$459,200.00
In Cash	267,481.40
Total	$726,681.40

120 "The sum of $726,681.40 represented

principal of claim	$380,761.54
interest to date of decree	335,398.83
interest after decree	10,521.03
	$726,681.40

"Of the $335,398.83 interest included in the judgment $278,889.94 accrued subsequent to the death of Hermann Sielcken on October 8th, 1917. The amount of the claim sustained by the court was thus at Sielcken's death $437,270.43, or 61½ per cent of the amount of the judgment.

"Out of the sums so received, there was paid in accordance with such compromise:

"The expense of bringing the securities to New York	$ 200.00

To Zentral Einkaufs-Gesellschaft:

In said United States Treasury Notes	$229,200.00	
Cash as owelty on the division made of the Treasury notes	400.00	
Half the $267,481.40 cash received (less $100 half the expenses of bringing the securities to New York	133,640.70	363,240.70
		122
To Theodor Wille		50,000.00
		$413,440.70

Leaving as the gross recovery by the firm from this claim as per such compromise:

Cash (deposited in the Three Name Account)	83,240.70
United States Treasury 3½% notes (delivered to the Executor)	230,000.00

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"The Wille claim, pursuant to such compromise, resulted in an award to Sorenson, Nielsen and this Executor jointly, by the Mixed Claims Commission—United States and Germany, of date April 21st, 1930, of:

"Principal as of April 1, 1918	$558,827.85
Interest from April 1, 1918, to January 1, 1928	272,524.27
Total	$831,352.12

"Discounting the $558,827.85 of April 1, 1918, as of October 8th, 1917, we have a face value of the principal *awarded* as of the death of Sielcken of $543,274.71 (or 65 1/3 per cent of the total award of $831,352.12) as the amount of the claim at the time of Sielcken's death.

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"All payments so far made on account of this award have been applied by the United States Treasurer upon this sum of $831,352.12 and none on subsequently accruing interest.

"From each such payment made by him the Treasurer of the United States deducted his statutory commission of one-half per cent before remitting.

"The payments so made are as follows:

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"1930	Credit Against Award	Treasurer's Commission	Actual Payment Received
June 2	$468,713.25, less ½%	$2,343.56	$466,369.69
Nov. 12	43,516.66, less ½%	217.58	43,299.08
1931			
Apr. 28	$ 28,721.00, less ½%	$ 143.61	28,577.39
1932			
Jan. 8	$ 78,408.33, less ½%	$ 392.04	78,016.29

"(This last warrant for $78,408.33 was issued October 9th, 1931, but Mr. Sorenson refused to endorse it until January 8th, 1932.)

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"The balance of this award remains wholly unpaid. The statement from the United States Treasury Department of November 22nd, 1937, shows a balance of the original amount of the award still due of $211,992.88
plus interest therein accumulated to March 31, 1937, of 180,389.55
none of which has been paid.

"No later statement has been received from the Treasury Department and no further payment has been made on this award. Whether any further payments will ever be received is highly problematical. (See letter from the Treasury Department in Schedule B-1.) [This affidavit, page 31.]

"All the cash so received in the settlement on both claims was deposited with the Irving Trust Company (as bank and not as executor) to the credit of said Sorenson and said Nielsen, but withdrawals therefrom could be made only by checks countersigned by the Executor. This bank account is commonly called the 'Three Name Account.'

"Sorenson and Nielsen's Executor (Nielsen died in September, 1930) claimed to be each entitled to 12½ per cent of both these recoveries, as profits of the firm. 128

"Four 'Export Managers' of the former firm, T. Weitling, Budelmann, James W. Smith and Kirkpatrick, each claimed to be entitled pursuant to their contracts of employment by the firm, to ten per cent of the recovery on the claim against the Zentral Einkaufs Gesellschaft as profits of their department.

"One Stewart also claimed to be entitled to 20 per cent of that recovery, as an attorney employed to prosecute a claim at one time asserted in the name of the firm *against Great Britain,* for its seizure of the cargoes, the price of which cargoes was the subject of the recovery from the Zentral 129 Einkaufs Gesellschaft, as the purchaser thereof, by the District Court suit and the compromise of that judgment.

"These various claims against these partnership assets—covering 85 per cent of the recovery on the Zentral Einkaufs Gesellschaft and 25 per cent of the award of the Mixed Claims Commission—were asserted in a series of suits begun by such various claimants, and involved the executor in heavy litigation, to defeat the claims so asserted against these partnership assets.

"Sorenson also in 1930, in the same connection, advanced the claim that, as sole surviving member of the former firm, he was entitled to liquidate the

assets of the firm, and, by steps attempted to be taken by him in that alleged capacity, he involved the executor in additional litigation. Sorenson also assumed to make federal income tax reports in the name of the firm in accordance with his own claims that these recoveries were profits of the firm, in which he was entitled to share. These reports led to the Federal income tax proceedings settled in 1934.

"The claims of Sorenson and Nielsen's Executor to these recoveries, and Sorenson's claim to be entitled as surviving partner to liquidate the affairs of Crossman & Sielcken, were all asserted in one action and were all finally determined invalid, after a long trial, by a judgment of the Supreme Court for New York County entered on November 11th, 1933 in the action brought by the Chase National Bank as Ancillary Executor of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, Clara Sielcken-Schwarz and this executor (and others who were never served in the action or appeared therein).

"The balance of the fund in the Three Name Account was thereupon transferred to the executor. In the interim some payments had been made out of the 'Three Name Account' by the Executor (with the co-operation of Sorenson and Nielsen or his executor) on account of expenses incurred in the recovery by the firm of the claims against Wille and the Zentral Einkaufs Gesellschaft."

The files of the Department of Justice disclose that the proceeds of the satisfaction of the decree in the instant suit in the United States District Court for the Southern District of New York, totalling $726,681.40, consisting of $267,481.40 cash and $459,200 United States Treasury Notes, were placed in a joint account at the Central Hanover Bank and Trust Company, New York City, for the account of Brainard S. Avery, attorney for the plaintiffs, and Arthur Garfield Hays, attorney for the defendant

Zentral-Einkaufs-Gesellschaft m. b. H., and said proceeds were equally divided between said Avery and said Hays.

A report of Special Agent C. A. Herring of the Federal Bureau of Investigation of the Department of Justice, dated January 31, 1938, in the files of the Department of Justice, states:

"On January 24, 1938 the writer interviewed Mr. Arthur Garfield Hays and Mr. William Abramson, partner in the firm of Hays, St. John, Abramson and Schulman, 120 Broadway, New York City, who advised that their files in the suit of John S. Sorenson, and Thorlief S. B. Nielsen, as surviving partners and liquidating agents of the firm of Crossman and Sielcken vs. Howard Sutherland, as alien property custodian and Frank White, treasurer of the U. S. and the Zentral Einkaufs Gesellschaft (Imperial German Government Central Purchasing Agency), Equity No. 4428, U. S. District Court, Southern District of New York, were located in their warehouse and that it would take two or three days to have these files brought to their office. They stated that they could not furnish definite figures concerning the distribution of funds received in the settlement of this case until they could refer to their files. This law firm represented the Zentral Einkaufs Gesellschaft in this suit. 134 135

"On January 27, 1938, the writer again contacted Mr. William Abramson, who advised that his files disclosed that as a result of an agreement reached in the claim of Sorenson and Nielsen against the Zentral Einkaufs Gesellschaft and THEODOR WILLE and Company before the Mixed Claims Commission the following cash and bonds were paid by the alien property custodian to Brainard Avery and Earl G. Barnes, attorneys for Sorenson and Nielsen, about April 1, 1930: Treasury check $267,481.40; Treasury notes $459,200; Total $726,681.40.

"Mr. Abramson stated that these funds were placed

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in a joint account of Avery and Hays at the National Metropolitan Bank, Washington, D. C., and were transmitted to the Central Hanover Bank and Trust Company, New York City, for the account of these individuals.

"Mr. Abramson advised that the above cash and Treasury notes were divided equally between Avery and Hays and that after deducting $50,000 which was deposited on April 23, 1930 with the J. Henry Schroeder Banking Corporation, New York City,
137 for the account of Theodor Wille and Company, Santos, his firm received a net amount of cash in the sum of $84,040.70. He stated that his firm received 1/2 of the Treasury notes or $229,600, and that on or about April 25, 1930 these Treasury notes were sold through the brokerage firm of Munds and Winslow, New York City, and that on April 25, 1930 they received the proceeds of $229,807.38 from the sale of these Treasury notes. This made total cash of $313,847.08. He stated that his firm deducted fees and expenses of $26,999 and on April 26, 1930 deposited the balance of $286,848.08 in the account
138 of Reichs Kredit Gesellschaft, A. G., Berlin, Germany, at the Equitable Trust Company, New York City.

"Mr. Abramson advised the writer that his law firm represented the Zentral Einkaufs Gesellschaft in this matter at the request of Dr. Heinrich F. Albert, Berlin, Germany. He stated that his firm received a letter from Dr. Albert dated April 14, 1930, at Berlin, Germany, instructing them to deposit $100,000 with the J. Henry Schroeder Banking Corporation, New York City, for the account of Theodor Wille and Company, Santos, also instructing them to deduct $25,000 for attorney's fees and instructing them to deposit the remainder of $288,847.08, less expenses, in the account of the Reichs Kredit Gesellschaft, A. G., Berlin, Germany, at the Equitable Trust Company, New York City."

Out of the other one-half of the amounts received in satisfaction of the said decree in the instant cause in the Southern District of New York and paid to said Brainard S. Avery, attorney for the plaintiffs, $50,000 was paid to said Arthur Garfield Hays to be applied in payment of one-half of the sum to be paid to said Theodor Wille, Santos, and cash in the amount of $83,240.70 was deposited in an account of John S. Sorenson and Thorleif S. B. Nielsen, with the Irving Trust Company, as a bank and not as Executor, with a restriction on the deposit that withdrawals therefrom were to be made by said 140
Sorenson and Nielsen only by checks countersigned by the Irving Trust Company, as Executor of Hermann Sielcken. The balance of one-half of the proceeds of the recoveries in the instant suit, namely $230,000 in United States Treasury Notes, was delivered by said Brainard S. Avery to the Irving Trust Company, as Executor of Hermann Sielcken, deceased.

The award by the Mixed Claims Commission, United States and Germany, to the Irving Trust Company, as Executor of Hermann Sielcken, deceased, jointly with said Sorenson and said Nielsen, was in the total amount of $831,352.12, of which the Treasurer of the United States 141
paid to the said Executor the sum of $616,262.45, including interest to January 8, 1932, and less one-half of one per cent commission deducted by the Treasurer of the United States. The payment of the balance of the award of the Mixed Claims Commission by the Treasurer of the United States to the Irving Trust Company, Executor of Hermann Sielcken, deceased, is dependent upon contingencies set forth in a letter of the Assistant Commissioner of Accounts and Deposits, United States Treasury Department, dated November 22, 1937, to Duer, Strong & Whitehead, attorneys for the Irving Trust Company, as Executor of Hermann Sielcken, deceased. A copy of the said letter is as follows:

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"Treasury Department
Office of the Secretary
Washington

"Commissioner of
Accounts and Deposits

November 22, 1937.

Duer, Strong and Whitehead,
15 Broad Street,
New York, New York.

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Gentlemen:

Receipt is acknowledged of your letter of November 16, 1937, requesting information with respect to further payments out of the German Special Deposit account, on account of the award made to Crossman and Sielcken by the Mixed Claims Commission, United States and Germany under Docket No. 8304.

(a) The amount on deposit in the German Special Deposit Account or available thereto is approximately $19,800,000, which the Secretary of the Treasury will have to disburse in accordance with the priorities established in Section 4 of the Settlement of War Claims Act of 1928.

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(b) The Secretary of the Treasury has received no official notice from the Secretary of State of the final disposition of applications of the Black Tom claimants. The Treasury is not in a position to state when these claims will be disposed of.

(c) If the so-called sabotage claims are disallowed and the funds available to the German Special Deposit Account are distributed, the American claimants holding Class 3 awards (awards in excess of $100,000) would be entitled to an additional payment under priority No. 5 of approximately 5% on balance due on principal account (award plus interest to January 1, 1928) and a payment under prior-

ity No. 8 of approximately 22% on the interest accrued from January 1, 1928 to March 31, 1937. On this award the dollar amounts would be approximately as follows:

5% of balance of unpaid principal of $211,992.88	$10,599.64
22% of interest accrued from January 1, 1928 to March 31, 1937, aggregating $180,389.55	39,685.70

If, however, the sabotage claims are allowed, there 146
would be no funds available for distribution after these claimants were paid the same percentage as other Class 3 claimants.

(d) After the distribution of the reserve fund referred to above, no further funds will be available to the German Special Deposit Account until the Government of Germany resumes payments on the reichsmarks bonds deposited with the Treasury under the debt funding agreement of June 23, 1930.

No payments have been received on these bonds since 147
September 30, 1931.

Very truly yours,

(Signed) M. COLLINS.
M. COLLINS,
Assistant Commissioner of
Accounts and Deposits."

On January 14, 1938, the Attorney-General of the United States, as successor in interest to the Alien Property Custodian, filed in the Surrogate's Court for New York County a Petition for Leave to Intervene, on behalf of the United States, in the matter of the Judicial Settlement of the Account of the Proceedings of the Irving Trust Company, filed by it as Executor of the Estate of Hermann Sielcken, deceased, on December 13, 1937. As set forth on pages 24 to 28 of this affidavit, said Executor therein seeks to account before the Sur-

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rogate for the moneys received by it as a result of the decree entered by this Court in this case.

On April 21, 1938, Mr. Surrogate Foley handed down an opinion granting the application of the Attorney-General in its entirety. A copy of said opinion is attached hereto, made a part hereof, and marked Exhibit DD.

Upon examination of the foregoing facts and the exhibits hereto annexed in support thereof, it therefore appears:

149 1. That the said plaintiffs brought this cause in this Court as alleged surviving partners of the firm of Crossman & Sielcken in pursuance of Section 61 of the partnership law of the State of New York, whereas, in fact, upon the death of the said Hermann Sielcken on October 8, 1917, and pursuant to the terms of the partnership agreement between Sielcken and said plaintiffs, and in accordance with Section 68 of the partnership law of New York as well as by virtue of the terms of Sielcken's will, the sole right to liquidate the partnership assets and the property of the said firm of Crossman & Sielcken was, at all times since the death of the said Sielcken, vested sole-
150 ly in the said Executor named in his will; that under the terms of the said partnership agreement and the said will neither Sorenson nor Nielsen was lawfully entitled to act as liquidator or as liquidating partner of the said firm; that under the terms of a settlement made by the firm of Crossman & Sielcken, in liquidation, with each of said plaintiffs, on or about December 23, 1917, neither said Sorenson nor said Nielsen had thereafter any claim whatsoever to, or interest in, the assets or profits of said firm; and that by a Judgment entered on November 11, 1933, the Supreme Court of New York for the County of New York has so determined.

2. That immediately after the effective date of the Trading with the Enemy Act, October 6, 1917, the Alien Property Custodian seized all of the assets of the firm of Crossman & Sielcken, and title thereto became vested in the United States, and thereupon the said Sorenson

and said Nielsen were divested of all right, title and interest which they may have had in and to said assets of the firm of Crossman & Sielcken, individually, or as surviving partners; that by the allowance in 1921 in purported pursuance of Section 9 of said Act, of the claim of the Columbia Trust Company, as Executor of Hermann Sielcken, all right, title and interest of the Alien Property Custodian in the interest of Hermann Sielcken in the Liquidation of Crossman & Sielcken was ordered returned to the Columbia Trust Company, as Executor; that therefore said Sorenson and said Nielsen had no 152
standing under said Act to file a Notice of Claim for said debt or institute the instant suit upon said claim.

3. That the said plaintiffs nevertheless instituted this suit upon the said claim under Section 9 of the Trading with the Enemy Act in their alleged capacity as surviving partners of the said firm of Crossman and Sielcken in order to "make the suit stick," with full knowledge that the said Executor was the sole owner of the alleged debt which was the basis of the said claim, and of this suit, but was precluded from filing any claim therefor with the Alien Property Custodian upon which a proper suit under Section 9 of the said Act could be brought by 153
reason of the fact that the deceased testator, Hermann Sielcken was an enemy; that the Executor of said Sielcken was at all times, and still is, within the prohibition of the said Act against the filing of claims by enemies or by their Executors or Administrators, for debts alleged to be due them out of property seized and held by the Alien Property Custodian.

4. That said plaintiffs alleged in said sworn claim that no person or persons whatsoever had any interest in or lien upon the proceeds of the claim; that the claim was not filed in collusion with any enemy, ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the Trading with the Enemy Act; and that there were no set-offs, counterclaims or defenses; whereas, in fact, the said shipments out of which the said debt arose, and for the recovery

of which the said claim and this suit upon the claim were filed, were made on behalf of the firm of Crossman & Sielcken with the firm of Theodor Wille of Hamburg, Germany, under an agreement whereby the merchandise so to be purchased and shipped should belong in equal undivided shares to the said two firms of Crossman & Sielcken and Theodor Wille, respectively, and that the purchase, shipment and sale thereof should be for their joint account as a joint adventure; that said firm of Wille was at all times an enemy within the meaning of
155 the Trading with the Enemy Act; that, in fact, the said plaintiffs and the said Executor were fully aware of the joint enemy ownership in the shipments, the said Sorenson and Nielsen and the said Executor having theretofore filed a joint Petition, under oath, before the Mixed Claims Commission, United States and Germany, wherein the recovery sought was expressly limited to one-half of the total value of the cargoes.

5. That in a decision rendered by the Court of Arbitration at Hamburg, Germany, on January 20, 1918, in pursuance of a suit brought by the said Z. E. G. against the German executors of the will of the said Sielcken,
156 it was determined by interlocutory decree that the Z. E. G. had not assumed the risk of loss and was not liable on certain of the said shipments; that on August 3, 1918, the said German executors of the Estate of Sielcken entered into an indemnity agreement with the said Z. E. G., whereby the executors promised to save the Z. E. G. harmless against any possible claim which might later be made by the firm of Crossman & Sielcken against the Z. E. G. on account of those shipments for which the Z. E. G. was held not to be obliged to reimburse Crossman & Sielcken; that the said plaintiffs through their attorneys, engaged in numerous conferences with officials of the German Foreign Office and other German authorities in Berlin, after the filing of this suit in this Court; that partly in consideration of the said indemnity agreement and partly in consideration of a consent award being agreed to by the German Government to the extent of one-half the amount sought

in certain claims filed by the estate of Sielcken before the Mixed Claims Commission, United States and Germany, the Z. E. G. failed to answer the complaint filed herein and by default sought to secure the release to said plaintiffs of the moneys held in trust by the Alien Property Custodian and by the Treasurer of the United States; that upon ascertaining that a decree so entered would be objected to by the Alien Property Custodian and the Treasurer, the said Z. E. G. thereafter entered its appearance and filed its answer to the bill of complaint herein; that as a result of said conferences and after the trial of this case, the said plaintiffs recognized 158 the validity and effect of the aforesaid indemnity agreement and recognized the claim of the said Z. E. G. against the Executor of said Sielcken arising out of said agreement; that after the entry of the decree and in accordance with the aforesaid conferences and the tentative agreements made in Berlin in March of 1928, involving the Mixed Claims Commission award, said plaintiffs, through their attorneys, transmitted one-half of the amount recovered under the decree to the attorneys for the defendant Z. E. G.; that said distribution, as well as a payment to the enemy firm of Theodor Wille Company of Hamburg in settlement of its joint ownership claim 159 on these cargoes were both made out of moneys recovered in violation of the provisions of the Trading with the Enemy Act, as amended.

That the source of his information are letters, papers, documents, and exhibits in the possession of the United States Department of Justice, concerning the issues of this motion to vacate the decree entered in the instant suit.

Wherefore, deponent prays that the final decree entered in this cause be vacated and set aside, and for such other relief as this Court may deem just and proper.

FRANK C. STERCK.

Sworn to before me this
18th day of May 1938.
Armand Chankalian,
Notary Public,
New York Co.
Clerk's No. 301, Reg. No. 9C392.
Commission expires March 30, 1939.

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Index to Exhibits.

(Contained in Affidavit of Frank C. Sterck.)

Exhibit

A Partnership agreement of Hermann Sielcken, John S. Sorenson, and Thorleif S. B. Nielsen, dated June 2, 1913.

B Last Will and Testament of Hermann Sielcken in accordance with the law of New York, dated March 23, 1914.

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C Affidavit of Carl Heynen dated April 25, 1925.

D Publication of a declaration of the Reichsminister of Finance dated October 31, 1926, whereby the Zentral-Einkaufs-Gesellschaft m. b. H. ceased to exist as a corporate entity and its assets passed over to the Imperial German Government.

D-1 Translation of Exhibit D.

D-2 Extract from the Commercial Register.

D-3 Translation of Exhibit D-2.

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E Letter from Hermann Sielcken to John S. Sorenson dated September 22, 1914.

F License No. ET-344 issued to Sorenson and Nielsen by the War Trade Board, dated November 16, 1917.

G Letter dated November 30, 1917, appointing the Columbia Trust Company to represent the Alien Property Custodian in the liquidation of the firm of Crossman & Sielcken.

H Letter dated November 30, 1917, from the Columbia Trust Company to the Alien Property Custodian accepting the appointment to act as Agent for the Alien Property Custodian in the liquidation of the firm of Crossman & Sielcken.

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Exhibit

I Letter dated December 12, 1917, to Alien Property Custodian from the Columbia Trust Company.

J Certificate of Clerk of the Surrogate's Court stating that the Columbia Trust Company was appointed Executor of Hermann Sielcken, deceased, on January 26, 1918, together with copy of Letters Testamentary.

K Copy of Claim 5914, filed with the Alien Property Custodian March 29, 1921, by the Columbia Trust Company, as Executor of the Estate of Hermann Sielcken, deceased. 164

L Claim dated December 29, 1922, filed with the Mixed Claims Commission by the Columbia Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken, against Germany.

M Claim dated October 26, 1927, filed before the Mixed Claims Commission by the American Exchange Irving Trust Company, as successor to the Columbia Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken, against Germany and the Zentral-Einkaufs-Gesellschaft. 165

N Answer of German Government, dated October 15, 1928, filed through its Agent, Karl von Lewinski, before the Mixed Claims Commission.

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Exhibit	
O	Claim No. 38530 filed with the Alien Property Custodian on October 29, 1927, by the American Exchange Irving Trust Company, Executor of the Last Will and Testament of Hermann Sielcken, deceased, and by Sorenson and Nielsen, as Liquidators of the firm of Crossman & Sielcken.
P	Letter dated October 27, 1927, to Alien Prop-
167	erty Custodian from Barnes, Avery & Whiting, enclosing Claim No. 38530.
Q	Claim No. 38566, dated November 12, 1927, filed with the Alien Property Custodian by John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken.
R	Letter dated November 12, 1927, from R. S. Doyle of the firm of Hopkins, Starr, Hopkins & Hamel, Washington D. C., to the Alien Property Custodian, transmitting Claim No. 38566.
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S	Letter dated November 21, 1929, to W. H. Pettry, Claims Division, Alien Property Custodian's Office, from Hamel & Doyle, stating that Mr. Hamel and Mr. Doyle are associated with Messrs. Barnes, Avery & Whiting, in the prosecution of Claims 38566 and 38530.
T	Testimony of Brainard S. Avery taken in January of 1935 before Referee Seligsberg.
U	Copy of account of Theodor Wille on the books of Crossman & Sielcken, dated September 30, 1917, charging Theodor Wille one-half of the loss on the cargoes which were seized by the British Naval Authorities in April, 1915.

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Exhibit

V Letter dated March 24, 1930, from Arthur Garfield Hays, attorney for the Zentral-Einkaufs-Gesellschaft, to The Attorney-General, advising that the Zentral-Einkaufs-Gesellschaft would not take an appeal from the decree.

W Letter dated March 27, 1930, from Earl B. Barnes and Brainard Avery to Arthur Garfield Hays, setting forth the distribution of the proceeds of the award of the Mixed Claims Commission and of the amounts received in satisfaction of the decree entered by this Court in the instant suit in the Southern District of New York. 170

X Copy of letter dated April 17, 1930, from O. R. Judd, Vice President of the Irving Trust Company, to Leonard B. Smith, attorney for the Irving Trust Company.

Y Letter dated April 24, 1930, from Brainard Avery to Messrs. Crossman & Sielcken in Liquidation, Mr. John S. Sorenson and Mr. Thorleif S. B. Nielsen, Liquidators. 171

Z Judgment entered in the New York Supreme Court for the County of New York on the 11th day of November, 1933, upon the report of Referee Henry F. Wolff, in an action brought by the Chase National Bank of the City of New York, as Ancillary Executor of the Last Will and Testament of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, Irving Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, Clara Sielcken Schwarz, and others.

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Exhibit	
AA	Final Judgment dated November 8, 1937, upon the judgment entered in the New York Supreme Court for the County of New York on November 11, 1933, in the action brought by the Chase National Bank of the City of New York, as ancillary Executor of the Last Will and Testament of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, Irving Trust Company, as Executor of
178	the Last Will and Testament of Hermann Sielcken, deceased, Clara Sielcken Schwarz and others.
BB	Release of Thorleif S. B. Nielsen to the firm of Crossman & Sielcken.
CC	Release of John S. Sorenson to the firm of Crossman & Sielcken.
DD	Opinion of Surrogate Foley, handed down April 21, 1938, on application of the Attorney-General to intervene in the Judicial Proceedings of the Estate of Hermann Sielcken, deceased.
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Exhibit A Annexed to Affidavit of Frank C. Sterck. 175

Partnership agreement of Hermann Sielcken, John S. Sorenson, and Thorleif S. B. Nielson, dated June 2, 1913.

COPY

THIS AGREEMENT, made the second day of June in the year One thousand nine hundred and thirteen, By and Between Hermann Sielcken, party of the first part, John S. Sorenson, party of the second part, and Thorleif S. B. Nielsen, party of the third part, 176

WHEREAS the said Hermann Sielcken is the sole surviving member of the firm of Crossman & Sielcken, which has for many years past been engaged in business in the City of New York, and the parties hereto of the second and third parts have been in the employment of the said firm for some thirty years past and the party of the first part has now admitted them as partners to continue the business of the said firm of Crossman & Sielcken, upon the terms as hereinafter expressed;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH, that 177 the parties hereto, in consideration of their mutual trust and confidence in each other and of the sum of One Dollar ($1.00) by each of them to the others duly paid, receipt whereof is acknowledged by each, do hereby agree to form a co-partnership upon trial and subject as to its continuance or otherwise to the will of the party of the first part who is now the sole owner of the business.

ARTICLES OF CO-PARTNERSHIP

FIRST: The firm name of the partnership shall be "Crossman & Sielcken,"

SECOND: The business of the partnership shall be that of dealers in general merchandise, as the same has heretofore been carried on by the firm of Crossman & Sielcken.

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THIRD: The partnership shall continue until terminated by the death of one of the partners, or it may be ended at any time by notice in writing, given by the party of the first part to the parties of the second and third parts, terminating the partnership thirty (30) days after the date on which such notice is given.

FOURTH: The place of business of the partnership shall be at Number Ninety (90) Wall Street in the City and County of New York, or at such other place or places as the partners may hereafter determine.

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FIFTH: The capital of the partnership shall consist of all the property and assets of every kind and description belonging to the said Hermann Sielcken, as surviving partner of the late firm of Crossman & Sielcken, or such part thereof as may be used in the business of the partnership now formed, including the goodwill of said firm. The whole of the said capital shall continue to be the property of the said party of the first part, and, upon the termination of the partnership from whatever cause, the same shall belong, entirely and absolutely, to the party of the first part or to his estate. The parties of the second and third parts shall have no share or title in or to any of the said capital, their only interest in the business consisting of their shares of the net profits that may be realized therefrom.

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SIXTH: The net profits resulting from the business of the firm shall be divided as follows: The parties hereto of the second and third parts shall each be entitled to and shall receive the sum of One thousand Dollars ($1,000) for each month from June 1, 1913, to October 1, 1913, as his full share of said profits down to the said 1st day of October, 1913. From and after the 1st day of October, 1913, the said parties of the second and third parts shall each be entitled to and shall receive twelve and one-half per cent (12 1/2%) of the net profits of the business, as his share of said profits. The amount of the net profits shall be arrived at by

deducting from the gross income of the business all the expenses of carrying on the business, all losses incurred, and interest at the rate of six per cent (6%) per annum on the amount or value of the said capital of the firm which interest shall be paid to the said party of the first part.

After the first day of October, 1913, the parties of the second and third parts shall each be entitled to draw out of the moneys of the firm, for living expenses, the sum of One thousand Dollars ($1,000) a month, as a part, and on account, of his share of the net profits, 182
unless it should appear that such draft would exceed his share in the net profits which had been received by the firm at the date of such withdrawal.

The other seventy-five per-cent (75%) of the net profits, as well as all the net profits of the business prior to October 1, 1913, above the amounts drawn by the parties of the second and third parts as above provided, shall belong to the party hereto of the first part.

The party of the first part agrees to bear and pay any and all losses that may be incurred in the course of the business; such losses will of course reduce the 183
amount of the net profits, and so diminish the shares of the parties of the second and third parts in said profits, but the party of the first part will protect and save harmless the parties of the second and third parts from all individual liability to pay such losses or any of them.

SEVENTH: Each of the partners shall devote his time and best personal efforts and energy to the promotion of the interests of the partnership.

EIGHTH: Neither of the partners shall become liable as surety or bondsmen for any other person or persons, or incur any liability as endorser or otherwise for the accommodation of any other person or persons, without the written consent of his co-partners.

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NINTH: Books of account shall be kept containing proper entries of all the business and transactions of the partnership and such books of account, together with all bonds, notes, bills, securities, letters and other writings and papers, relating to the business of and belonging to the partnership, shall be open at all times to the examination and inspection of all the partners.

TENTH: On or about the first day of October in each year, there shall be made, and signed by the partners, a full inventory, account and balance sheet in
185 writing showing all the property and assets constituting the capital of the partnership as defined in above Article Fifth, and also showing the debts and liabilities of the partnership, and stating the net value thereof; all the entries therein shall be made as of the first day of October.

Every such annual inventory, account and balance sheet, made after the first one dated October 1, 1913, shall also show the amount of the net profits of the year preceding, the amount drawn on account thereof by each partner and the balance thereof standing to the credit of each partner. Each partner shall then be
186 entitled to withdraw such balance of profits standing to his credit.

ELEVENTH: Upon the death of the party of the first part, it shall be the duty of the surviving partners to transfer and pay over to the executor of the will of the deceased partner his capital as above defined and also all the property and business of the firm.

TWELFTH: Upon the death of either of said parties of the second and third parts during the continuance of the partnership, or in case the partnership shall be terminated by notice as provided in Article Third, the business of the partnership may be closed out and liquidated by the party of the first part or, at his option, he may continue the business, in either case as the sole owner thereof. Immediately upon such termination of the partnership, a balance sheet shall be made, showing

the profits of the business from the time of the last preceding balance sheet down to the date of such termination of the partnership, and the party of the first part shall pay over to the other surviving partner and to the estate of the deceased partner, their respective shares of the net profits realized from the business down to the date of such termination of the partnership.

THIRTEENTH: The amount of the profits realized from the business shall be conclusively fixed and determined by the balance sheets to be made as provided in these Articles and each of the parties hereto of the 188
second and third parts hereby covenants and agrees, for himself, his executors, administrators and assigns, that he and they will abide and be bound by the said balance sheets as settling beyond controversy their respective rights and interest in the profits and business of the firm; and that neither of them, nor the executors, administrators or assigns of either of them, will, at any time, bring any action or proceeding, at law or in equity, against the party of the first part, his executors, administrators or assigns, for an accounting as to the business of the firm or setting up any claim to any share, right or interest, in the business or the profits thereof, 189
other than or different from that fixed and established by the said balance sheets.

IN WITNESS WHEREOF, the parties to this agreement have hereunto set their hands and seals the day and year first above written.

(Signed) HERMANN SIELCKEN (Seal)
JOHN S. SORENSON (Seal)
THORLEIF S. B. NIELSEN (Seal)

Sealed and Delivered
In the presence of
JOHN B. MELUA.

190 **Exhibit B Annexed to Affidavit of Frank C. Sterck.**

Last Will and Testament of Hermann Sielcken in accordance with the law of New York, dated March 23, 1914.

I, HERMANN SIELCKEN, of Baden-Baden, Germany, do hereby make, publish and declare, the following to be my Last Will and Testament:

FIRST: I appoint Gustav Diederichsen and his brother Heinrich Diederichsen of Kiel, Germany, and my brothers-in-law, Carl Isenberg and Richard Isenberg residing
191 in Germany, the Executors of this my Will.

I also appoint the COLUMBIA KNICKERBOCKER TRUST COMPANY OF THE CITY OF NEW YORK, Executor of this Will, for the purpose of collecting and converting into cash all my property stiuated in the United States of America, and I direct said Company to my said Executors in Germany for administration and distribution by them. It is my wish that all my estate should be administered and distributed in Germany, under the laws and in the tribunals of Germany my domicile.

It is my desire that the said Trust Company should
192 engage as their attorney and legal counsel in the administration of the estate, EUGENE SMITH of the City of New York, who has been conversant with my personal affairs and those of my firm for the past thirty years.

SECOND: Whereas, since the death of my late partner George W. Crossman, in the firm name of Crossman & Sielcken, I have become the sole owner of the property and business of that firm and I have admitted into partnership JOHN S. SORENSON and THORLIEF S. B. NIELSEN to continue the business of the said late firm under the same firm name; and the Articles of Co-partnership made between us, bearing date the second day of June, 1913, provide that in case of my death the said partnership shall come to an end and that it

shall then be the duty of the surviving partners to transfer and pay over to the executor of my Will all the capital, property and business of the said firm,

It is my desire that my executor, the Columbia Knickerbocker Trust Company, should leave the management of the firm business for liquidation in the hands of the said Sorenson and Nielsen, to the largest possible degree, under the direct supervision of the said Trust Company. In such case, the said Sorenson and Nielsen shall each receive, as compensation for their services in such liquidation, the sum of One thousand dollars ($1,000) a month, 194
after my death, from the commencement of the liquidation to its end. In addition to this compensation, I give and bequeath to the said John S. Sorenson and Thorlief S. B. Nielsen each the sum of Fifty thousand dollars ($50,000) such legacies to be paid upon the final accounting of the said Trust Company as executor hereof.

THIRD: I have made a promise to Heinrich Seidel, Lina Kraft and my chief gardener Brinkmann, who have long been in my employment on my estate in Baden-Baden, that I will pay the sum of Five thousand Marks to each of them who remains in my employment on the 1st day of April, 1917, and I direct my executors to pay 195
the said sum of Five thousand Marks to each of them who shall remain in my employment at the time of my death in case I should die before the 1st day of April, 1917.

FOURTH: I give to the City of Baden-Baden, Germany, the amount of Sixty thousand Dollars ($60,000) to be invested in German Government securities, and the income to be applied in perpetuity to maintaining and keeping up the Park containing the Josephinen Fountain and the Park to be called the "Sielcken Anlagen." In case the City declines to call the Park "Sielcken Anlagen," this bequest shall become null and void and the said Sixty thousand Dollars ($60,000) shall fall back into the residuary estate.

FIFTH: I give to the hospital in Baden-Baden, built

by me and called Josephinen Heim the sum of Sixty thousand ($60,000) Dollars of which the income only shall be used for the purpose of maintaining and keeping up the institution.

SIXTH: I give all the rest, and residue of all my property and estate, real and personal, whatsoever and wheresoever situated, to my wife Clara Sielcken, absolutely.

SEVENTH: In case my wife should die before me or in case we should both lose our lives together in some
197 common accident or disaster, then, and in either such case only, I give and dispose of my said residuary estate as specified and directed in the following Articles of this Will, none of which shall be of any force or effect if my said wife survives me.

My wife and I have made, contemporaneously herewith, mutual Wills, each giving all of his or her property to the other, and the following Articles of this Will relate to and include any and all property I may thus derive from my wife.

EIGHTH: I give and devise all my said residuary estate to my said Executors in Germany, as Trustees, in
198 Trust and for the uses and purposes following, namely; to invest and keep invested, to receive the income arising therefrom and to apply the net income as follows; for the education and maintenance and to the use of my stepchildren, Alexander Wendroth and Ingeborg Wendroth, applying the following annual amounts to each of them, to wit: the sum of Fifteen thousand Marks every year, beginning from the date of my death, until they respectively arrive at the age of twenty-one years; the sum of Thirty thousand Marks for every subsequent year until they respectively arrive at the age of twenty-five years; the sum of Fifty thousand Marks for every subsequent year until they respectively arrive at the age of twenty-eight years, and the sum of Seventy-five thousand Marks for each of the two following years, until they respectively arrive at the age of thirty years. All the rest of the said income shall be applied by my

said Trustees in keeping up and maintaining in good repair and condition my estate, called "Mariahalden," situated at Baden-Baden, Germany, in paying taxes, insurance and other charges, relating to said estate, in enlarging the estate by the purchase of adjacent property, if desirable in the judgment of my said Trustees, in erecting new buildings, if deemed advisable in the judgment of my said Trustees, in purchasing works of art of every description, including paintings and sculpture, to add to those now on the premises, and especially in keeping up the garden in the best possible condition, 200
which includes the purchase and culture of rare flowers and plants; also in keeping up and maintaining in good repair and condition the estate now belonging to my wife, and known as "Muessen," near Segeberg, Holstein, Germany, and in paying all taxes, insurance and other charges and mortgages, if any, affecting the same.

NINTH: Upon my said stepson Alexander reaching the age of thirty years, it shall be the duty of my said Trustees to divide, convey and transfer, and I hereby give and devise, to him, in absolute ownership, one half part of all the said residuary trust estate; and thereupon the said trust shall cease as to such half part, but 201
shall continue as to the remaining half part for the benefit of my step-daughter Ingeborg until she reaches the age of thirty years. And upon the said Ingeborg reaching the age of thirty years, it shall be the duty of my Trustees to convey and transfer, and I hereby give and devise, to her, in absolute ownership, all the remaining part of the said trust estate and thereupon said trust shall come to an end.

In making the division of the said trust property herein directed, it is my will that the said estate called "Mariahalden," with all the furniture, silver, ornaments, works of art, and other like personal property, contained in the buildings on said estate, and also all the live stock, equipment and all other articles appurtenant to and used upon said premises, shall be included in the share of my stepdaughter, and the said estate called

202 *Exhibit B Annexed to Affidavit of Frank C. Sterck*

"Muessen" with all the property situated upon and pertaining to said estate, shall be included in the share of my stepson. My said Trustees shall appraise the two estates, and apply other property belonging to the trust in order to equalize the two shares in value. Until such division takes place, my said stepchildren shall have the right to occupy the said "Mariahalden" free from charges of any kind.

TENTH: If my stepson Alexander should die before
203 reaching the age of thirty years, leaving issue surviving him, I give and devise to such issue one-half part of the trust estate, which my Trustees shall then set apart, and convey and transfer to said issue.

But if the said Alexander should die before reaching the age of thirty years, leaving no issue, but leaving his sister, the said Ingeborg, surviving him, then my Trustees shall continue to hold the whole of the trust estate until she shall reach the age of thirty years, or until her death, in case she should die before attaining that age, applying the income to the use of the said Ingeborg with the same annual payments to her as directed in Article Eighth of this Will, and applying all the rest
204 of the income for the benefit and improvement of the estates "Mariahalden" and "Muessen," as specified in said Article Eighth. And upon the said Ingeborg reaching the age of thirty years, or upon her death before that age, my Trustees shall convey, transfer and deliver, and I hereby give and devise, the whole of the said trust estate to her, if living or, if dead, to her issue, or, in default of any such issue, surviving her, to the persons specified in Article Twelfth of this Will.

If the said Alexander should die before reaching the age of thirty years, leaving no issue, and his sister Ingeborg should have died before him, I give and devise, and my Trustees shall convey and deliver, the whole of the trust estate to the issue then living of the said Ingeborg, or, if there is no such issue then living, to the persons specified in said Article Twelfth.

ELEVENTH: If my stepdaughter Ingeborg should die before reaching the age of thirty years, leaving issue surviving her, I give and devise to such issue, one half part of the trust estate, which my Trustees shall then set apart and convey and transfer to said issue.

But if the said Ingeborg should die before reaching the age of thirty years, leaving no issue, but leaving her brother, the said Alexander, surviving her, then my Trustees shall continue to hold the whole of the trust estate, until the said Alexander shall reach the age of thirty years, or until his death, in case he should die 206
before attaining that age, applying the income to the use of the said Alexander with the same annual payments to him as directed in Article Eighth of this Will, and applying all the rest of the income, for the benefit and improvement of the estates "Mariahalden" and "Muessen," as specified in said Article Eighth, and upon the said Alexander reaching the age of thirty years, or upon his death before that age, my Trustees shall convey, transfer and deliver, and I hereby give and devise, the whole of the said trust estate to him, if living, or, if dead, to his issue, or, in default of any such issue, surviving him, to the persons specified in Article Twelfth 207
of this Will.

If the said Ingeborg should die before reaching the age of thirty years leaving no issue, and her brother Alexander should have died before her, I give and devise and my Trustees shall convey and deliver, the whole of the trust estate to the issue then living of the said Alexander, or, if there is no such issue then living, to the persons specified in said Article Twelfth.

TWELFTH: In the event of both my stepchildren dying before reaching the age of thirty years, leaving no issue surviving either of them, I then give all the said trust estate to my wife's brothers and sisters, namely: Carl Isenberg, Richard Isenberg, Frau Julie Barckhausen and Frau Paula Volkmann, and her nephews Alexander and Rudolph, sons of her deceased brother, Alexander Isenberg, the said brothers and sisters each taking an equal

208 *Exhibit B Annexed to Affidavit of Frank C. Sterck*

fifth part thereof, and the said nephews taking in equal shares the remaining fifth part.

LASTLY, I hereby revoke any and all Wills made by me at any time before this my Last Will and Testament.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this twenty-third day of March, in the year One thousand nine hundred and fourteen.

(Sd) HERMANN SIELCKEN.
(L. S.)

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Signed, Sealed, Published and Declared by the said Testator, HERMANN SIELCKEN, to be his Last Will and Testament, in the presence of us and each of us, who, at his request, in his presence, and in the presence of each other have hereunto subscribed our names as witnesses this 23rd day of March, 1914.

210 JAMES WALLIS SMITH, East Orange, N. J.

GEORGE UNDERWOOD KIRKPATRICK, 47 E. 58th Street, N. Y. City.

TERIJON WEITLING, 195 Fingerboard Road, Fort Wadsworth, S. I., N. Y.

Exhibit C Annexed to Affidavit of Frank C. Sterck. 211

Affidavit of Carl Heynen, Dated April 25, 1925.

United States of America
State of New York
County of New York ss:

CARL HEYNEN, being duly sworn, deposes and says:

That during the years 1915 and 1916 he was a duly accredited attache of the German Embassy in the City of Washington, representing the Imperial German Government; that he is familiar with the organization and purposes of the Zentral Einkaufs Gesellschaft, a German corporation; that said corporation was organized under governmental direction; that it was a governmental agency and the representative of said corporation in this Country was H. F. Albert, who was also attached to the German Embassy; that all of the business of said corporation in this Country was conducted through his office, which was designated as the Commercial Office of the German Embassy; that he knows that the operations of said corporation in the United States were exclusively for the purpose of purchasing goods, principally food stuffs and raw materials; that he acted from time to time as an assistant to the said Albert and thus a representative of the Zentral Einkaufs Gesellschaft; that he knows that the original capital of the said corporation was principally subscribed for by the Imperial German Government and German States and the free cities of Hamburg, Bremen and Lubeck; that said corporation was financed by the Imperial German Government and funds furnished it with which to buy supplies and raw materials; that he is familiar with the conditions under which the notes of the Imperial German Government, known as Series 26, were sold in this Country, and also with the disposition made of the proceeds of the sale of said notes; that a large percentage of the proceeds of said notes were turned over by the German Embassy and placed to the credit

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214 *Exhibit C Annexed to Affidavit of Frank C. Sterck*

of the Zentral Einkaufs Gesellschaft, and used by it in the purchase of supplies and raw materials for the Imperial German Government; that the funds in the hands of the Zentral Einkaufs Gesellschaft which were seized by the Alien Property Custodian, were in fact a portion of the proceeds of the sale of said Imperial German Government notes;

That said corporation transacted no business other than for the benefit of the Imperial German Government or its people in the supply of goods as was here-
215 tofore stated, and that it was not conducted for profit; that it was intended to be, and was, exclusively, a German Governmental agency, and handled its business for the German Government and its people;

That since December 13, 1921, he has held and now holds a power of attorney to act for and represent the said corporation in the United States of America;

That the affairs of the Zentral Einkaufs Gesellschaft are now in liquidation and that said corporation is no longer actively engaged in business.

CARL HEYNEN

Sworn to and subscribed before me this
216 25th day of April, 1925.

My commission expires Mar. 30, 1927.

Bertha L. Rosenstein,
Notary Public.

Bertha L. Rosenstein, Notary Public.
Bronx Co. Clerk's No. 100, Reg. No. 2729-A.
N. Y. Co. Clerk's No. 267, Reg. No. 7242.
Kings Co. Clerk's No. 68, Reg. No. 7250.
Commission expires March 30, 1927.

Exhibit D Annexed to Affidavit of Frank C. Sterck. 217

Publication of a declaration of the Reichsminister of Finance dated October 31, 1926, whereby the Zentral-Einkaufs-Gesellschaft m. b. H. ceased to exist as a corporate entity and its assets passed over to the Imperial German Government.

Beglaubigte Abschrift.

BEKANNTMACHUNG.

Auf Grund des Gesetzes über die Abwicklung von 218
Kriegsgesellschaften und Kriegsorganisationen vom 15. Juli 1921—R. G. Bl. Nr. 78 vom 29. Juli 1921 Seite 942—erkläre ich hierdurch, dass mit dem heutigen Tage die folgende Gesellschaft mit ihren Aktiven und Passiven auf das Reich übergeht:

Zentral-Einkaufs-Gesellschaft mit beschränkter Haftung in Liquidation, Berlin NW.7, Am Weidendamm 1a.

Mit der Abwickelung der Geschäfte dieser Gesellschaft wird die Reichs-Kredit-Gesellschaft Aktiengesellschaft zu Berlin W.8, Behrenstrasse 21/22, beauftragt.

Berlin, den 31.Oktober 1926. 219

DerReichsminister der Finanzen.
Im Auftrage
gez. v. BRANDT.

Für richtige Abschrift:
ZYBELL,
Leiter der Kanzlei V.

(Seal)

220 **Exhibit D-1 Annexed to Affidavit of Frank C. Sterck.**

Translation of Exhibit D.

Translation.

Certified Copy.

PUBLICATION.

Upon the law concerning the winding up of war corporations and war organizations of July 15, 1921—German Law Record No. 78, of July 29, 1921, page 942—
221 I hereby declare that at the present day the following corporation passes over to the Reich, together with its assets and liabilities:

Zentral-Einkaufs-Gesellschaft mit beschraenkter Haftung in Liquidation, Berlin NW. 7. Am Weidendamm la.

The Reichs-Kredit-Gesellschaft Aktiengesellschaft of Berlin W. 8. Behrenstrasse 21/22, is charged with the winding up of the affairs of this corporation.

Berlin, October 31, 1926.

222 The Reichs Minister of Finance.
By Order (Signed) v. Brandt.

For the correctness of the copy
(Signed) ZYBELL,
Chief of the Chancery.

(Legal Seal.)

Exhibit D-2 Annexed to Affidavit of Frank C. Sterck.

Extract from the Commercial Register.

Amtsgericht in Berlin-Mitte, Abteilung 122.

BEGLAUBIGTE ABSCHRIFT

AUS DEM

HANDELSREGISTER

ABTEILUNG B, NR. 13553.

1. Nummer der Eintragung.	2. Firma und Sitz.	3. Gegenstand des Unternehmens.	4. Grund- oder Stamm-Kapital.	5. Vorstand; persönlich haftende Gesellschafter; Geschäftsführer; Liquidatoren.	6. Prokura
1.	Zentral-Einkaufs Gesellschaft mit beschränkter Haftung. Berlin.	Die Förderung des deutschen Wirtschaftslebens durch die Beschaffung und den Vertrieb von Waren jeder Art unter Berücksichtigung der durch Kriegslage geschaffenen besonderen Verhältnisse. Die Gesellschaft kann sich an anderen kaufmännischen oder gewerblichen Unternehmungen beteiligen und darf ihren Betrieb auf Handelsgeschäfte jeder Art ausdehnen. Die Gesellschaft verfolgt ausschliesslich gemeinnützige Zwecke.	45 Millionen Mark		
2.					
3.					
4.					
5.					

Exhibit D-2 Annexed to Affidavit of Frank C. Sterck

1.	2.	3.	4.	5.	6.
Nummer der Eintragung.	Firma und Sitz.	Gegenstand des Unternehmens.	Grund- oder Stamm-Kapital.	Vorstand; persönlich haftende Gesellschafter; Geschäftsführer; Liquidatoren.	Prokura
6.				Liquidatoren sind: Kaufleute Otto Meyer und Friedrich Undütsch sowie Rechtsanwalt Dr. Hugo Israel sämtlich in Berlin.	
7.					
8.					

Exhibit D-2 Annexed to Affidavit of Frank C. Sterck

7.	8.	9.	10.
Gesellschaftsvertrag oder Satzung Vertretungsbefugnis.	Auflösung; Konkurs; Fortsetzung; Richtigkeit; Erlöschen der Firma.	Geschäftsnummer; Tag der Eintragung; Unterschrift.	Bemerkungen.
Gesellschaft mit beschränkter Haftung. Der Gesellschaftsvertrag ist am 5. Januar 1915 abgeschlossen.		122. HRB. 13553/2. 11. Januar 1915. Fürstenberg.	
Durch Beschluss vom 13. Januar 1916 sind §§ 9, Abs. 8 und 11 des Gesellschaftsvertrages abgeändert.		122. HRB. 13553/25. 13. März 1916. Raethel.	
Durch Beschluss vom 31. Juli 1916 sind §§ 9, 13 und 16 des Gesellschaftsvertrages abgeändert.		122. HRB. 13553/36. 7. August 1916. Raethel.	
Durch Beschluss vom 5. Dezember 1916 sind §§ 15 und 16 des Gesellschaftsvertrages abgeändert.		122. HRB. 13553/57. 28. Dezember 1916. Fleig.	
Durch Beschluss vom 15. Mai 1917 sind §§ 9 und 14 des Gesellschaftsvertrages abgeändert.		122. HRB. 13553/60. 23. Mai 1917. Vitsch.	

Exhibit D-2, Annexed to Affidavit of Frank C. Sterck

7. Gesellschaftsvertrag oder Satzung Vertretungsbefugnis.	8. Auflösung; Konkurs; Fortsetzung; Richtigkeit; Erlöschen der Firma.	9. Geschäftsnummer; Tag der Eintragung; Unterschrift.	10. Bemerkungen.
eder Liquidator ist in Geeinschaft mit einem anderen ur Vertretung berechtigt.	Die Gesellschaft ist aufgelöst.	122. HRB. 13553/9. 12. Oktober 1920. Eue.	Nach aufhebung der Geheimhaltungspflicht aus dem Geheimregister B 13553 hier her übertragen, soweit die Eintragungen noch gültig sind. 122. HRB. 13553/99 10. April 1922. Schumacher.
Durch Beschluss vom 31.3.1921 ist der Gesellschaftsvertrag hinsichtlich des §5 (Organe der Gesellschaft) geändert. § 11 ist gestrichen.		122. HRB. 13553/93. 19. Dezember 1922. Schumacher.	
	Die Firma ist gemäss §§ 7 und 10 des Ges. vom 15. Juli 1921 RG. Bl. Seite 942 gelöscht.	122. HRB. 13553. 3. November 1926. Kern.	

Vorstehende Abschrift stimmt mit den Registereintragungen Wörtlich überein.

Berlin den 3. November 1926.

(Illegible.)
Justizobersekretar,
Amtsgerichts Berlin/Mitte, Abtl. 122.

(Seal)

Exhibit D-3, Annexed to Affidavit of Frank C. Sterck. 235

Translation of Exhibit D-2

District Court in Berlin-Mitte, Division 122

CERTIFIED COPY
from the
COMMERCIAL REGISTER
DIVISION B, NO. 13553

NUMBER OF THE FIRM 13553

1. NUMBER OF REGISTRATION	2. FIRM AND PLACE OF BUSINESS	3. PURPOSE OF THE BUSINESS	4. ORIGINAL CAPITAL OR ORIGINAL STOCK	5. BOARD OF DIRECTORS; PERSONALLY LIABLE PARTNERS; MANAGERS; LIQUIDATORS.	6. PROKURA (Procuration)
1	Zentral-Einkaufs-Gesellschaft mit beschrankter Haftung. (Central Purchasing Corporation with limited liability) Berlin.	The fostering of the German economy by the acquisition and distribution of merchandise of all kinds, having regard to the special conditions, created by the war situation. The corporation may engage in other commercial or industrial enterprises and is permitted to extend its operation to other commercial branches of all kinds. The corporation pursues exclusively public utility purposes/ serving the common welfare/.	45 million marks		
2					
3					
4					
5					

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237

238 *Exhibit D-3 Annexed to Affidavit of Frank C. Sterck*

NUMBER OF THE FIRM: 13553

7. CONTRACT OF INCORPORATION OR ARTICLES OF INCORPORATION; POWER OF ATTORNEY.	8. DISSOLUTION; BANKRUPTCY; CONTINUANCE; NULLITY; EXTINCTION OF THE FIRM.	9. BUSINESS NUMBER; DATE OF REGISTRATION; SIGNATURE.	10. COMMENTS
Company with limited liability. The contract of incorporation was entered into on January 5, 1915.		122 HRB 13553/2 January 11, 1915 Furstenberg	(Commercial Register)
239 §§ 9, Par 8 and 11 of the contract of incorporation have been amended by resolution of January 13, 1916.		122 HRB, 13553/25 March 13, 1916 Raethel.	
§§ 9, 13 and 16 of the contract of incorporation have been amended by resolution of July 31, 1916		122 HRB, 13553/36 August 7, 1916 Raethel	
§§ 15 and 16 of the contract of incorporation have been amended by resolution of December 5, 1916		122 HRB 13553/57 December 28, 1916 Fleig	
240 § 9 and 14 of the contract of incorporation have been amended by resolution of May 15, 1917.		122 HRB 13553/60 May 23, 1917 Vitsch	

NUMBER OF THE FIRM 13553

1. NUMBER OF REGISTRATION	2. FIRM AND PLACE OF BUSINESS	3. PURPOSE OF THE BUSINESS	4. ORIGINAL CAPITAL OR ORIGINAL STOCK	5. BOARD OF DIRECTORS; PERSONALLY LIABLE PARTNERS; MANAGERS; LIQUIDATORS.	6. PROKURA (Procuration)
6				Liquidators are: Merchants Otto Meyer and Friedrich Undutsch as well as Councillor-at-Law Dr. Hugo Israel, all in Berlin.	
7					
8					

Exhibit D-3 Annexed to Affidavit of Frank C. Sterck 241

NUMBER OF THE FIRM: 13553

7. CONTRACT OF INCORPORATION OR ARTICLES OF INCORPORATION; POWER OF ATTORNEY.	8. DISSOLUTION; BANKRUPTCY; CONTINUANCE; NULLITY; EXTINCTION OF THE FIRM.	9. BUSINESS NUMBER; DATE OF REGISTRATION; SIGNATURE.	10. COMMENTS
Each liquidator is jointly with another liquidator authorized for representation.	The company is dissolved.	122 HRB 13553/9 October 12, 1920 Eue	Transferred to this register from secret register B13553 after abolition of the duty of secrecy, as far as entries are still valid. 122 HRB. 13553/99 April 10, 1922 Schumacher 242
The contract of incorporation has been amended with respect to § 5 (organs of the company) by resolution of March 31, 1921. § 11 has been stricken out.		122 HRB 13553/98 December 19, 1922 Schumacher	
	The company is extinguished in accordance with § § 7 and 10 of the Law of July 15, 1921. RGB 1. P. 942.	122 HRB 13553 November 3, 1926 Kern.	243

The above copy is word for word identical with the entries in the Register

Berlin, November 3, 1926
(signature illegible)
Court Clerk, The Documentary official of the Office of the District Court, Berlin-Mitte, Div. 122.

(Seal: Prussian District Court *Berlin-Mitte.)

244 **Exhibit E Annexed to Affidavit of Frank C. Sterck.**

Letter from Hermann Sielcken to John S. Sorenson dated September 22, 1914:

HOTEL ATLANTIC

RESTAURANT PFORDTE

Hamburg Septr 22 1914

a. d. Alster 72-79,

245 Berlin:
Hotel Atlantic
Der Kaiserhof

My dear Mr Sorensen:

When you receive enclosed letter you will be astonished, however I had my eye on the war from beginning & wrote you there might be some profitable business develop in time. I found the right people, who are willing to have the connection, to sell the goods, and give us a fair profit.

Dont forget it is necessary for us to remain owners of
246 the cargo until the steamer arrives at destination, you have to swear as American citizens that we are the owners, and we are until the cargo is paid for & delivered I have some friends who receive a part of the profit & who are willing to take a risk on $125,000.—a week, who will guarantee us to sell on arrival & who will pay us a profit of a sufficient amount, & we have nothing to do with the loss, if any occurs. You know I will not work for small profits—a difficult business; Wille share the risk with us What our eventual buyers will make or loose, is immaterial to me, we have a sure profit payable cash against delivery for every cargo we dispatch. The amount is limited to about $125,000.— weekly of the articles I enclose. My prospective buyers are rich and a non payment is excluded.

On arrival of the steamer I go to Copenhagen to deliver the bills of lading against money only, & in future

Exhibit E Annexed to Affidavit of Frank C. Sterck 247

I will find out through Wille whether they will deliver & receive the money. I will buy a cable transfer to pay the amount of the cargo with profit to C & S in N. Y.

On the cargo, that is the merchandise you need not make a profit when the cargo is delivered in good order & condition. We will get sufficient profit to be satisfied.

We have to swear the cargo is our property & you have to swear to it as American citizens. Keep the whole matter quiet, no unnecessary alarm or undue secrecy, but let Mr. Kirkpatrick manage the purchases & Mr. Nielsen 248
the insurance. The war risk is less as American citizens, in a neutral vessel to a neutral port. Let us pay the closest attention, in buying good quality & ship in good condition. I cannot judge how money conditions are with you, the amount for the total will not exceed say $375,000.— before we get our money back for each individual cargo by cable transfer my friends here would pay or send us money but then we would not be the owners of the merchandise & could not swear to it that we are We must be until the vessel arrives.

If you are short of money borrow on anything we have, as we get the money back quickly. It is supposed that 249
everybody is willing to back the Export business, at least to assist it In any other shape we could not ship the cargos and get buyers on arrival. We are to be the owners and then I have the promise of first class merchants beyond all doubt, secured absolutely, that they will find buyers. Anyhow how much they make is nothing to us, if we get prompt pay and a handsome profit. I must not write too much. You will understand these are war times, where everybody is curious, and all act as spy's. I found this opportunity and it will last so long as the war and general troubles exist.

Hide the letters or destroy them after taking notes. Let nobody but Nielsen know what it is The Export department will find out when we count profits

On a separate sheet you get the list what to ship and how to send bills of lading etc

250 *Exhibit E Annexed to Affidavit of Frank C. Sterck*

The long letter I wrote, and let some friends see it, you will understand what the meaning is about some matters. Without that I could not obtain the confidence of the people, who will speculate on arrival of the merchandise. They have money and the connections

Later on I may give more details Look that you fill the cargoes well & let me know by the steamer which brings the merchandise, how you finance. We may have to pay a good price for the money, if a safe party, to be trusted. I am willing, the business will pay for it

251 With kind regards

Yours

H. SIELCKEN

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Exhibit F Annexed to Affidavit of Frank C. Sterck. 253

License No. ET-344 issued to Sorenson and Nielsen by the War Trade Board, dated November 16, 1917.

War Trade Board
Washington, D. C.

License No. ET-344
Dated, Nov. 16, 1917

UNITED STATES OF AMERICA

LICENSE TO ACT ON BEHALF OF ENEMY

(Issued Under Trading with the Enemy Act.) 254

License is hereby granted to JOHN S. SORENSON and THORLEIF S. B. NIELSEN, doing business as co-partners with Herman Sielcken, under the firm name of CROSSMAN & SIELCKEN, 90 Wall Street, New York, City, to continue to do such business on behalf of Herman Sielcken and in the course of same to trade with any person, firm or corporation, excepting an "enemy" or "ally of enemy" not holding a license under this act, or a person acting on behalf of or for the benefit of such "enemy" or "ally of enemy," as may be necessary for the sale, liquidation and disposition of the interest of 255 the said Herman Sielcken in the business, assets and property of the said firm of Crossman & Sielcken. The licensees may, however, collect any sums due from the "enemies" or "allies of enemies" and persons acting on behalf of or for the benefit of such "enemies" or "allies of enemies," a list of whom has been forwarded to the War Trade Board and the Alien Property Custodian.

It is a term and condition of this license that (1) said liquidation shall be carried out under the supervision of Arthur Young & Co. of New York, as Certified Public Accountants, and under such additional supervision and in accordance with such plan and method as may be desired by the Alien Property Custodian, and all expenses of such supervision shall be paid as part of the expenses incidental to said liquidation;

256 *Exhibit F Annexed to Affidavit of Frank C. Sterck*

(2) the licensees shall turn over to the Alien Property Custodian the share of the "enemy" partner in said firm of such proceeds of said liquidation either at the termination of said liquidation or from time to time during the course of said liquidation as the Alien Property Custodian shall desire;

(3) a report of the progress of said liquidation shall be made to the Alien Property Custodian and the War Trade Board at the end of each calendar month, or oftener if required; and

257

(4) this license is revocable and subject to amendment in the discretion of the War Trade Board.

This license is issued on the basis of the statements made in your application, and is subject to the rules and regulations which have been, or which may be hereafter issued by the War Trade Board and to any special conditions that may be set out herein.

WAR TRADE BOARD
VANCE C. MCCORMICK,
Chairman.

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BUREAU OF ENEMY TRADE
by G. H. DORR.

This license is not valid unless signed and impressed with the seal of the War Trade Board.
(Seal)

Exhibit G Annexed to Affidavit of Frank C. Sterck. 259

Letter dated November 30, 1917 appointing the Columbia Trust Company to represent the Alien Property Custodian in the liquidation of the firm of Crossman & Sielcken.

(Copy).

Washington, D. C., November 30, 1917.

Columbia Trust Co.,
60 Broadway, 260
New York City.

Gentlemen:

I hereby appoint you my Agent to represent me in the liquidation of Crossman & Sielcken.

I enclose copy of license which shows Messrs. Sorensen & Nielsen are to liquidate, subject to my supervision; also official notice to Messrs. Crossman & Sielcken of my appointment, which you should hand to them, retaining a copy for your files.

All of the expenses of supervising the liquidation are 261
proper charges against the trust, as you will see by the license. I shall be glad to talk over with you the amount of your compensation after you have had an opportunity to acquaint yourself with the details.

A representative of Arthur Young & Company is in the office, for the purpose of supervising expenses and making reports, which services you may want to continue. I will be glad to go over this matter after you have had a chance to familiarize yourself.

The license, as you will notice, calls for monthly reports. Please see that they are forwarded in duplicate form to me, as I want to retain one and send the other to Washington.

Questions of policy, also requests to approve authority to sell assets, compromise or adjust claims and accounts,

262 *Exhibit G Annexed to Affidavit of Frank C. Sterck*

at least for the immediate future, should be taken up with me or my Assistant, Mr. H. O. Kilbourn, for consideration, until you become familiar with my general thoughts on these subjects.

There should be prepared immediately a statement of the assets and liabilities as of close of business this date, so that there may be had a statement showing the assets that I may be charged with the supervision of, which will be a basis of the Alien Property Custodian to
263 account from to the enemy partners.

In order that the Custodian may be in a position to properly account for the assets and justify the liquidation, all of the books, papers and records of this Company must be retained and finally placed in storage, so that access may be had to them at the time of the accounting at the close of the war.

Will you please see that this is done.

Very Respectfully,

BJ.
Enc.

264

Manager, Dept. of General Business.

Exhibit H Annexed to Affidavit of Frank C. Sterck. 265

Letter dated November 30, 1917 from the Columbia Trust Company to the Alien Property Custodian accepting the appointment to act as Agent for the Alien Property Custodian in the liquidation of the firm of Crossman & Sielcken.

Willard V. King, President
Charles H. Keep, Chairman of the Board
Orrin R. Judd, Trust Officer
A. N. Hazeltine, Asst. Trust Officer
Willard C. Mason, Asst. Trust Officer
S. Stern, Manager Foreign Dept. 266
Frederick G. Herbst, Auditor

Howard Bayne, Vice President
Geo. E. Warren, Vice President
Harris A. Dunn, Vice President
Charles F. Minor, Vice President
J. Sperry Kane, Asst. Secretary
Fred'k V. Clowes, Asst. Secy.
Charles E. Wolff, Asst. Secy.
Henry M. Atkins, Asst. Secy.

Benj. L. Allen, Vice President
James Ely Miller, Vice President 267
Langley W. Wiggin, Vice Pres. & Secy.
Fred C. Marston, Treasurer
Robert I. Curran, Asst. Treas.
Walter G. Kimball, Asst. Treas.
Howard E. Rider, Asst. Treas.
Arthur W. Hutchins, Asst. Treas.

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

Uptown Office
5th Avenue & 34th Street
Harlem Branch
100 West 125th Street
Bronx Branch
3rd Avenue & 148th Street

268 *Exhibit H Annexed to Affidavit of Frank C. Sterck*

November 30, 1917

Joseph A. Bower, Esq.
Manager, Dept. of Business,
Alien Property Custodian
c/o Liberty National Bank,
120 Broadway, New York City.

My dear Sir:

269 We hereby acknowledge and accept the appointment to act as your Agent in the liquidation of the firm of Crossman & Sielcken as set forth in your favor of the 30th instant, and acknowledge receipt from you of two copies of the license granted by the War Trade Board to Messrs. John S. Sorensen and T. S. B. Nielsen; also official notice signed by the Managing Director of the Alien Property Custodian, addressed to Messrs. Crossman & Sielcken with reference to your appointment. The original notice and a copy of the license we are delivering to Crossman & Sielcken.

270 We note your instructions with regard to going over with you the questions of policy and other important matters, and also that we are to render monthly reports in duplicate. We have also taken steps to obtain a statement of the assets and liabilities of Crossman & Sielcken as of the close of business today, in accordance with your request.

Assuring you that we will give the matter our best attention, we are

Yours very truly,

G. E. WARREN
Vice President

gew.dw

Exhibit I Annexed to Affidavit of Frank C. Sterck. 271

Letter dated December 12, 1917 to Alien Property Custodian from the Columbia Trust Company.

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

December 12, 1917

J. A. Bower, Esq. Manager 272
Department of General Business,
Alien Property Custodian,
c/o Liberty National Bank,
120 Broadway, New York City.

Dear Mr. Bower:

As Agent for the purpose of liquidating the firm of CROSSMAN & SIELCKEN, and acting under your directions received from time to time, I beg to report as follows:

1) SECURITIES 273

Columbia Trust Company has taken possession of the stocks and bonds and other securities belonging to the firm of Crossman & Sielcken, which have been entered on our books under an account in the name of "A. Mitchell Palmer, Alien Enemy Custodian, Crossman & Sielcken Account." We are arranging for the transfer of certain of the stocks to the name of the Custodian. Other stocks which are in the name of the firm and will probably be disposed of within a short time, are not being transferred. The liquidation of these securities will proceed as rapidly as they can be disposed of advantageously.

274 *Exhibit I Annexed to Affidavit of Frank C. Sterck*

2) Cash Balances

The cash balances in various banks have all been consolidated in an account with Columbia Trust Company. All disbursements are made only on receipt of a voucher signed by a representative of Arthur Young & Company and by the Columbia Trust Company as liquidating agent.

3) Merchandise on Hand

275 The merchandise on hand is being gradually disposed of. No general liquidation will take place until we hear from Mr. Rothschild, who was designated to look into the matter of disposing of this property. We expect to hear from him within a day or two.

4) Accounts and Notes Receivable

These accounts are being collected as rapidly as possible and a large majority of them will work out in the next 60 or 90 days. There are a few cases that will have to be given special attention and will be taken up with
276 you later.

5) Custody of Books and Papers

We have taken possession of two safes, on which we have placed a combination known only to the officers of this company, in which the important records are stored every night. These books are delivered by our representative to the representative of Arthur Young & Company every morning.

6) Correspondence

One of our representatives has been going through the files of correspondence in regard to rubber shipments or any other matters that may be of special interest and is setting aside any letters which we believe may be of

interest to you. The correspondence in regard to the rubber shipments is kept in our possession.

7) British Prize Claims

We enclose herewith copies of correspondence from Sherman & Sterling and from English solicitors, with regard to the British seizures of merchandise belonging to Crossman & Sielcken. In view of the inquiry being made by the State Department, no further action will be taken by us until a report is received by them. 278

We enclose also copy of a letter from Messrs. Davies, Auerbach & Cornell, and one from Messrs. Gifford, Hobbs & Beard, bearing on the question of the rubber held as collateral for the advances on account of Weber & Schaer, and also on the question of the former partners' interest in these assets.

We would be obliged if you would confirm the foregoing action, if it is in accordance with your wishes.

Yours respectfully,

G. E. WARREN

gew.dw Vice President 279

280 **Exhibit J Annexed to Affidavit of Frank C. Sterck.**

Certificate of Clerk of the Surrogate's Court stating that the Columbia Trust Company was appointed Executor of Hermann Sielcken, deceased, on January 26, 1918, together with copy of Letters Testamentary.

No. A 138203

THE PEOPLE OF THE STATE OF NEW YORK,

To all to whom these presents shall come or may concern,

281

SEND GREETING:

KNOW YE, That we, having inspected the Records of our Surrogate's Court in and for the County of New York, do find that on the 26 day of January in the year one thousand nine hundred and eighteen by said Court, Letters Testamentary on the estate of Hermann Sielcken late of the County of New York, deceased, were granted unto Columbia Trust Company of the City of New York, N. Y. the Executor named in the last Will and Testament of said deceased, and that it does not appear by said Records that said Letters have been revoked.

282

In Testimony Whereof, we have caused the seal of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Honorable John P. O'Brien a Surrogate of our said County of New York, the 11 day of October in the year of our Lord one thousand nine hundred and twenty-seven

MARTIN G. McCUE,
Clerk of the Surrogate's Court.

Exhibit J Annexed to Affidavit of Frank C. Sterck 283

LETTERS TESTAMENTARY

THE PEOPLE OF THE STATE OF NEW YORK, By the grace of God free and independent, To all to whom these presents shall come or whom they may concern, Send Greeting:

Know ye, that at the County of New York, on the 25 day of January in the year of our Lord one thousand nine hundred and eighteen before Honorable Robert Ludlow Fowler a Surrogate of our said county, the last will and testament of Hermann Sielcken, deceased, was 284
proved, and is now approved and allowed by us; and the said deceased having been at the time of his death a resident of Baden-Baden, Germany, leaving personal property within the County of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testator and also the auditing, allowing and final discharging the account thereof doth belong unto us, the administration of all and singular goods, chattels and credits of the said deceased in any way concerning his will, is granted unto Columbia Trust Co. of the City of New York, N. Y., executor in the 285
said will named. The decree admitting said Will to probate enjoins said Executor from paying any legacy or money or transferring property in violation of the prohibition contained in the "Trading with the Enemy Act" approved Oct. 6, 1917.

IN TESTIMONY WHEREOF, we have caused the seal of office of the Surrogate's Court of the County of New York to be hereunto affixed.

WITNESS HONORABLE ROBERT LUDLOW FOWLER, a Surrogate of our said County of New York at said county, the 26 day of January, in the year of our Lord one thousand nine hundred and eighteen.

(Seal)

DANIEL J. DOWDNEY
Clerk of the Surrogate's Court.

286 *Exhibit J Annexed to Affidavit of Frank C. Sterck*

State of New York,
County of New York, ss:

I, Martin G. McCue, Clerk of the Surrogate's Court of said county, do hereby certify that I have compared the foregoing copy of Letters Testamentary granted unto the Columbia Trust Company of the City of New York, N. Y., upon the goods, chattels and credits of Hermann Sielcken deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such
287 original record.

In TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of New York, this 14 day of October in the year of our Lord one thousand nine hundred and twenty-seven.

MARTIN G. McCUE,
Clerk of the Surrogate's Court.

PR.

LETTERS TESTAMENTARY

288 Upon the Goods, Chattels and Credits of

HERMANN SIELCKEN

Deceased

Granted to

COLUMBIA TRUST CO. OF THE CITY OF NEW YORK, N. Y.

NOTICE.

Attention is called to the provisions of §231 and §104 of the Surrogate's Court Act, which make it a misdemeanor and a cause for removal for an Executor, Administrator, Trustee or Guardian to deposit or invest Estate funds in his individual account or name. All Estate funds must be deposited in the name of the Executor, Administrator, Trustee or Guardian in his or her representative capacity and to the credit of the estate.

Exhibit K Annexed to Affidavit of Frank ... ck. 289

Copy of Claim 5914, filed with the Alien Property Custodian March 29, 1921 by the Columbia Trust Company, as Executor of the Estate of Hermann Sielcken, deceased.

Claim 5914

State of New York
County of New York ss:

I, George E. Warren, a Vice President of the Columbia Trust Company, as executor of the Estate of Herman Sielcken, on March 29th executed for the Trust Company 290
above, a notice of claim and application for allowance filed under Section 9 of the Trading with the Enemy Act, seeking a release and return to the said Trust Company as executor, aforesaid, of One Hundred Thousand Dollars ($100,000) paid to the Alien Property Custodian by Crossman & Sielcken as part payment in the liquidation of the interest of Herman Sielcken in the firm of Crossman & Sielcken.

The Columbia Trust Company desires to amend the notice of claim and application for allowance so executed by me so that the notice of claim may include all the right, title and interest of the said Herman Sielcken 291
in the liquidation of the partnership of Crossman & Sielcken as such right, title and interest may have been acquired by the Alien Property Custodian by virtue of a demand, seizure, or voluntary turn over, and as now carried on the books of the Alien Property Custodian as the interest of Herman Sielcken in said partnership.

GEORGE E WARREN

State of New York
County of New York ss:

Sworn and subscribed to before me this 29th day of March, 1921.

W M MORGAN
Notary Public,
N. Y. County No. 163, Register's No. 1143
Cert. filed Bronx Co. No. 9, Reg. No. 2101
Term expires March 30, 1921.

292 *Exhibit K Annexed to Affidavit of Frank C. Sterck*

ALIEN PROPERTY CUSTODIAN.

APC form No. 111

Claim 5914 Trust 592

NOTICE OF CLAIM PURSUANT TO SECTION 9 OF "TRADING WITH THE ENEMY ACT."

Instructions.

293 Notice of claim, under oath, must be executed in duplicate by claimant and filed with the Alien Property Custodian, attention of Bureau of Law, Washington, D. C.

If claimant makes application to the Attorney General, in pursuance of sec. 9 of the "Trading with the enemy Act," and the Presidential Executive Orders thereunder, for the payment, conveyance, transfer, assignment, or delivery to said claimant of money or other property held by the Alien Property Custodian, he must append to his application to the Attorney General a sworn copy of this notice of claim.

Each individual claim must be presented on a sepa-
294 rate form.

Section 2 of the "Trading with the enemy Act" defines "enemy" and "ally of enemy" as follows:

"Sec. 2. That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this act—

"(*a*) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

"(*b*) The government of any nation with which the United States is at war or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

"(*c*) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by 296
proclamation, include within the term 'enemy.'

"The words 'ally of enemy,' as used herein, shall be deemed to mean—

"(*a*) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing busi- 297
ness within such territory.

"(*b*) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

"(*c*) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'ally of enemy.'"

298 *Exhibit K Annexed to Affidavit of Frank C. Sterck*

The Presidential Proclamation of February 5, 1918, in pursuance of section 2 (c) of the act, included within the meaning of the word "enemy," for the purpose of the "Trading with the enemy Act":

"All natives, citizens, or subjects of the German Empire or of the Austro-Hungarian Empire who, by virtue of the provisions of sections four thousand and sixty-seven, four thousand and sixty-eight, four thousand and sixty-nine, and four thousand and seventy, of the Revised Statutes, and of the proclamations and regulations there-
299 under, have been heretofore or may be hereafter transferred after arrest into the custody of the War Department for detention during the war."

Section 9 of the "Trading with the enemy Act" is as follows:

"Sec. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of
300 enemy, whose property, or any part thereof, shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require, and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any

suit at law or inequity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal 302
place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or 303
by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court."

The Executive Order of October 12, 1917, provides, among other things, as follows:

"XXXII. I vest in the Attorney General all power and authority conferred upon the President by the provision of section 9 of the 'Trading with the enemy Act.'"

304 *Exhibit K Annexed to Affidavit of Frank C. Sterck.*

To FRANCIS P. GARVAN,
ALIEN PROPERTY CUSTODIAN,
Washington, D. C.

The undersigned, hereinafter referred to as claimant, desiring to take advantage of section 9 of the "Trading with the enemy Act," hereby gives you notice of claim, as follows, and hereby agrees to furnish such other information and proof as you may require.

1. Name of claimant (individual, partnership, association, corporation): Columbia Trust Company as Executor of Will of Hermann Sielcken, dec.

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2. Address of claimant: No. 60 Broadway, New York City, New York.

3. Name of enemy or ally of enemy whose property is affected by this claim: Estate of Hermann Sielcken.

4. Residence or last known address of enemy or ally of enemy: New York, N. Y.

5. Name of any other persons, if known to claimant, who have any interest whatever in within claim: None.

306

6. Address or addresses of such person or persons: None.

7. If the claim, notice of which is hereby given, is made for certain specific property, or for an interest in property, the following questions must be answered:

(*a*). The said property was conveyed, transferred, assigned, or delivered to Alien Property Custodian by: Crossman & Sielcken

Address: (No.) 90 (Street) Wall Street (City) New York (Country) New York.

(*b*) The following is an accurate description of the property affected by this notice of claim (this description must be sufficiently complete to identify the property): $100,000.00 being a small part of this Estate, the balance being in the hands of the Executor (including any income therefrom). For proof of citizenship

8. The nature of the claim, notice of which is hereby given, is as follows: (If the claim is for only part of the property, describe that part, if of an interest, state precisely what the interest is; if of a debt, state fully the nature thereof, how it is evidenced, and whether there are any set-offs or counterclaims. Attach verified copies of all papers relied on to support claim):

This claim is by the executor of the Will of said Hermann Sielcken for the above mentioned fund paid to the Alien Property Custodian as the property of Hermann Sielcken who died October 8, 1917.

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The return of this property is asked in order that administration may be had thereon and proper distribution made under the terms of his Will. The enemy interest in this estate will be accounted for to the Alien Property Custodian.

The claimant represents and alleges that claimant is not an enemy or ally of enemy; that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the enemy Act"; that the claim herein referred to is in all respects bona fide, and that there are no set-offs, counterclaims, or defenses, except as herein stated.

309

Dated March 28th, 1921.

(Signature of party making claim.)
COLUMBIA TRUST COMPANY
by G. E. WARREN,
Vice President.

(Partnerships should sign by member or duly authorized representative. Corporations or associations should sign by officer or duly authorized representative, and should affix corporate or official seal.)

Attest:
(illegible)
Asst. Secy.

(Seal.)

310 *Exhibit K Annexed to Affidavit of Frank C. Sterck*

Affidavit of Individual Making Claim.

State of .....
County of ..... ss:

I swear (or affirm) that the foregoing statements are true and correct.

.....

Subscribed and sworn to before me this.....day of ....., 19....

311 .....
.....

Affidavit of Member or Representative of Partnership Making Claim.

State of .....
County of ..... ss:

I swear (or affirm) that I am..... of the partnership making foregoing claim, and that the fore-
312 going statements are true and correct.

.....

Subscribed and sworn to before me this.....day of ....., 19....

.....
.....

Exhibit K, Annexed to Affidavit of Frank C. Sterck 313

Affidavit of Officer or Representative of Corporation or Association Making Claim.

State of New York,
County of New York, ss:

I swear (or affirm) that I am a Vice President of the corporation/association making the foregoing claim, and that the foregoing statements are true and correct.

G. E. WARREN

Subscribed and sworn to before me this 29th day of 314
March, 1921.

M. B. LAFOUNACE
Notary Public, N. Y. County No. 430
Register's No. 2395
Cert. Filed in Bronx Co. No. 48, Reg. No. 2204-A
Term expires March 30th, 1922

(Seal)

Claim No. 5914 Trust No. 592

ALIEN PROPERTY CUSTODIAN

315

NOTICE OF CLAIM UNDER SECTION 9 OF THE "TRADING WITH THE ENEMY ACT."

COLUMBIA TRUST CO., Executor,
Claimant,

vs.

EST. HERMANN SIELCKEN,
Enemy.

Received and entered in the Bureau of Law Register of Claims Book 1, page 395.

Mar., 1921.

E. E. WHITAKER,
Bureau of Law.

316 *Exhibit K Annexed to Affidavit of Frank C. Sterck*

Copy of claim received from Bureau of Law.

....., 19.....

.....

Bureau of Trusts.

Notice received from Attorney General of application for order.

....., 19.....

317 .....

Bureau of Law.

Order made by Attorney General and copy received.

....., 19.....

.....

Bureau of Law.

Copy of Attorney General's order received from Bureau of Law.

....., 19.....

318 .....

Bureau of Trusts.

Service of summons in suit received.

....., 19.....

.....

Bureau of Law.

Notification of service of summons in suit received from Bureau of Law.

....., 19.....

.....

Bureau of Trusts.

Report Nos.:

Exhibit L Annexed to Affidavit of Frank C. Sterck. 319

Claim dated December 29, 1922, filed with the Mixed Claims Commission by the Columbia Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken, against Germany.

BEFORE THE MIXED CLAIMS COMMISSION
UNITED STATES AND GERMANY

Claim of 320	
COLUMBIA TRUST COMPANY, as Executor of the last Will and Testament of Hermann Sielcken, deceased, and JOHN S. SORENSON and THORLEIF S. B. NIELSEN, surviving partners of the firm of Crossman & Sielcken, against GERMANY.	December 29, 1922 Claim No. 2.

PETITION. 321

To the Honorable, The Secretary of State.

I. Your petitioners respectfully represent that the said Columbia Trust Company is and was at all the times hereinafter mentioned a domestic corporation, organized and existing under the laws of the State of New York, having its principal office at No. 60 Broadway, New York City, and that its stock is owned in whole or in part by citizens of the United States. That said John S. Sorenson and Thorleif S. B. Nielsen respectively are and were at all the times hereinafter mentioned duly naturalized citizens of the United States.

II. That said Columbia Trust Company is the executor named as "Columbia-Knickerbocker Trust Company" in the last Will and Testament of Hermann

322 *Exhibit L Annexed to Affidavit of Frank C. Sterck*

Sielcken, deceased, with respect to all property left by the said Sielcken in the United States of America, and particularly with respect to the liquidation of the firm of Crossman & Sielcken, hereinafter mentioned. That said Hermann Sielcken was at all the times hereinafter mentioned up to October 8th, 1917, a citizen of the United States, having been duly naturalized under the name of August Hermann Sielcken; and that he died on or about the 8th day of October, 1917.

III. That said last Will and Testament of Hermann
323 Sielcken was duly admitted to probate by the Surrogate's Court of New York County, in the State of New York, on or about the 25th day of January, 1918; that Letters Testamentary thereon were duly issued out of said Court to said Columbia Trust Company on the 26th day of January, 1918; and that said Columbia Trust Company thereupon duly qualified and entered upon the discharge of its duties as, and now is, such executor.

IV. That at all the times hereinafter mentioned up to October 8th, 1917, said Hermann Sielcken, John S. Sorenson and Thorleif S. B. Nielsen were engaged in busi-
324 ness as exporters, importers and commission merchants, as co-partners under the firm name and style of Crossman & Sielcken, having their principal place of business in the Borough of Manhattan, City, County and State of New York. That by their agreement of co-partnership, which bore date the 2nd day of June, 1913, it was provided, among other things, that the whole of the capital of said partnership was, and should continue to be, the property of said Sielcken, and that upon the termination of the partnership from whatever cause, the same should belong, entirely and absolutely, to said Sielcken or to his estate; and that said Sorenson and Nielsen respectively should have no share or title in or to any of the said capital, their only interest in the business consisting of their shares of the net profits that might be realized therefrom. And that in and by said agree-

ment of co-partnership it was further provided that upon the death of said Sielcken it should be the duty of the surviving partners to transfer and pay over to the executor of the will of the deceased partner his said capital and also all the property and business of the firm.

V. That pursuant to the provisions of said agreement of co-partnership, upon the death of said Sielcken as aforesaid, said surviving partners Sorenson and Nielsen did transfer and pay over to said Columbia Trust Company, as executor as aforesaid, the said capital and also 326
all the property and business of said firm; and that said Columbia Trust Company, as such executor, has ever since been and now is, engaged in liquidating the business of said partnership as if it had been carried on by said decedent in his sole name; and by reason of the foregoing, said Columbia Trust Company, as executor as aforesaid is entitled to collect and receive all the assets and credits of said firm of Crossman & Sielcken, and to prosecute and recover upon any and all causes of action and claims of whatever nature existing in favor of said firm at the time of its dissolution as aforesaid.

VI. That on or about the 27th day of February, 1915, 327
the said firm of Crossman & Sielcken shipped upon the Norwegian steamer Hilding, belonging to Seeberg Steamship Line, Inc., certain merchandise, to wit: 525 tierces of lard, of the value of $32,606.19; 260 cases of bellies, of the value of $24,857.78; 1800 cases of dried fruits, of the value of $8,749.58; 1000 cases of corned beef, of the value of $16,277.78; and 300 cases of fat backs, of the value of $23,012.11; being an aggregate value of $105,503.44; all of said merchandise being consigned to Harry Levin, a merchant of Copenhagen, Denmark, and being shipped as aforesaid for transportation to Copenhagen, and to be forwarded, if possible, to Malmo, Sweden.

VII. That on or about the 23rd day of March, 1915, the said firm of Crossman & Sielcken shipped from the

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Port of New York upon the Danish steamer Arkansas, belonging to Det Forenede Dampskibs Selskab, a Danish corporation, certain merchandise, to wit: 190 cases of fat backs and 150 cases of clear bellies, of the total value of $27,649.94, and 1600 cases of corned beef, of the value of $25,957.58; being an aggregate value of $53,607.52; all of said merchandise being consigned to said Harry Levin, and being shipped as aforesaid for transportation to Copenhagen, to be forwarded to Malmo, Sweden.

329 VIII. That on or about the 30th day of March, 1915, the said firm of Crossman & Sielcken shipped from the Port of New York upon the Danish steamer Hellig Olav, belonging to Det Forenede Dampskibs Selskab, a Danish corporation, certain merchandise, to wit: 405 cases of fat backs, of the value of $30,924.14 consigned to said Harry Levin, for transportation to Copenhagen, to be forwarded to Malmo, Sweden.

IX. That on or about the 12th day of April, 1915, the said firm of Crossman & Sielcken shipped from the Port of New York, upon the Swedish steamer Gunborg, belonging to the Gans Steamship Line, certain merchan-
330 dise, to wit: 1500 cases of breakfast food, of the value of $8,210.60; 200 cases of clear bellies, of the value of $16,905.76; and 300 cases of fat backs, of the value of $23,192.39; being an aggregate value of $48,308.75; all of said merchandise being consigned to said Harry Levin, and being shipped as aforesaid for transportation to Gothenburg, Sweden.

X. That said Harry Levin was at the time of the said respective shipments a citizen and subject of the Kingdom of Denmark; that the aforesaid shipments were made pursuant to an agreement of sale between the said firm of Crossman & Sielcken and the said Harry Levin wherein and whereby said Levin agreed to purchase said merchandise at the respective agreed prices hereinabove set forth as the respective values thereof; but by the terms of said agreement of sale, the title to said mer-

chandise was not to pass, nor payment of the purchase price to become due, until the arrival and delivery of said merchandise at its destination.

XI. That on or about the 23rd day of April, 1915, the said firm of Crossman & Sielcken shipped from the Port of New York upon the Swedish steamer Indianic, belonging to Swedish America Mexico Line, Ltd., certain merchandise, to wit: 250 cases clear bellies, 250 cases fat backs and 50 cases fat back ends, of the total value of $43,918.19, and 904 pieces of black walnut lumber, of the value of $5,940.03; being an aggregate value of 332
$49,858.22 (together with other merchandise); all of said merchandise being consigned to the firm of Beckmann & Jorgensen, merchants of Copenhagen, Denmark, and being shipped as aforesaid for transportation to Gothenburg, Sweden.

XII. That on or about the 27th day of April, 1915, the said firm of Crossman & Sielcken shipped from the Port of New York upon the Danish steamer Oscar II, belonging to Det Forenede Dampskibs Selskab, certain merchandise, to wit: 1450 cases of crackers and cereals, of the value of $7,864.66, and 1035 cases of fat backs, of the value of $84,199.36; being an aggregate value of 333
$92,064.02; all of said merchandise being consigned to the said firm of Beckmann & Jorgensen, and being shipped as aforesaid for transportation to Copenhagen, to be forwarded to Malmo, Sweden.

XIII. That the members of the said firm of Beckmann & Jorgensen were at the time of said shipments mentioned in paragraphs XI and XII hereof respectively citizens and subjects of the Kingdom of Denmark; that the said shipments mentioned in paragraphs XI and XII hereof were made pursuant to an agreement of sale between the said firms of Crossman & Sielcken and Beckmann & Jorgensen respectively wherein and whereby said Beckmann & Jorgensen agreed to purchase said merchandise at the respective agreed prices hereinabove set forth as the respective values thereof; but by the

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terms of said agreement of sale, the title to said merchandise was not to pass, nor payment of the purchase price to become due, until the arrival and delivery of said merchandise at its destination.

XIV. That at the time of all the shipments above mentioned, and thereafter until the time of his death as above set forth, said Hermann Sielcken, the senior partner of said firm of Crossman & Sielcken, was in Germany. The other partners, Messrs. Sorenson and Nielsen, were at the office of the said firm in New York
335 City, where they purchased the merchandise and made the shipments hereinbefore set forth. That said merchandise was purchased with funds belonging to the said firm of Crossman & Sielcken, and it was supposed by said Sorenson and Nielsen, and by all the employees of said firm in New York, that said merchandise was the exclusive property of said firm of Crossman & Sielcken; but that in fact, said shipments were made in pursuance of an agreement made by said Hermann Sielcken, on behalf of his said firm of Crossman & Sielcken, with the firm of Theodor Wille composed of Gustav Diederichsen and Georg Georgius, both of whom were citizens and subjects of the Empire of Germany,
336 and who were engaged in business as wholesale merchants at Hamburg, Germany, wherein and whereby it was agreed that the merchandise so to be purchased and shipped should belong in equal undivided shares to the said two firms of Crossman & Sielcken and Theodor Wille respectively, and that the purchase, shipment and sale thereof should be for their joint account as a joint adventure. That all of the members and employees of said firm of Crossman & Sielcken, other than said Hermann Sielcken himself, were in ignorance of said last mentioned agreement at the time of the seizure and condemnation of said merchandise as hereinafter set forth, and for a long time thereafter.

XV. That each one of the said vessels Hilding, Arkansas, Hellig Olav, Gunborg, Indianic and Oscar II, after

leaving the Port of New York carrying the aforesaid merchandise, and before arriving at any port of destination, was stopped upon the high seas by British men of war respectively, and taken to a port or ports in England, where the said merchandise, and each and every item thereof, were respectively seized by the British Admiralty, condemned and sold.

XVI. That claims to all of the aforesaid merchandise were presented by said Sorenson & Nielsen, in the name of and on behalf of the said firm of Crossman & Sielcken, in the Probate, Divorce and Admiralty Division of 338
the High Court of Justice of the Kingdom of Great Britain, sitting as a Prize Court, which Court had jurisdiction over the subject matter and parties in said controversy; that said claims were duly brought on for trial in said Court, before the Right Honorable Sir Samuel Evans, President, on November 19th, 1917, and such proceedings were thereupon had that on the said 19th day of November, 1917, a judgment was duly made and entered in said Court disallowing said claims and condemning said merchandise as lawful prize, upon the ground that said merchandise was intended for an ultimate destination in Germany.

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XVII. That the merchandise above mentioned was seized and condemned as aforesaid by Great Britain in pursuance of the various proclamations and orders in council of the British Government, as a retaliatory measure against the German submarine warfare. That your petitioners thereby suffered a loss, damage or injury in consequence of hostilities or the operations of war, subsequent to July 14th, 1914.

Wherefore your petitioners hereby make claim against the Government of Germany under the provisions of the Treaty between the United States and Germany of August 25th, 1921, and the Agreement between the United States and Germany of August 10, 1922, for the loss sustained by them as aforesaid in the sum of $190,133.05 being one-half of the total value of said merchandise

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($380,266.09), with such allowance for interest as may be due, and any other relief that may be due in the premises.

COLUMBIA TRUST COMPANY,
As Executor of the Will of Hermann Sielcken, deceased.
By G. E. WARREN
Vice-President.

JOHN S. SORENSON
THORLEIF S. B. NIELSEN

341 Attest:
M. M. Morgan,
Asst. Secretary.
(Seal)

State of New York,
County of New York, ss:

George E. Warren, being duly sworn says: I am a Vice-President of Columbia Trust Company, which, as Executor of the Will of Hermann Sielcken, deceased, is the petitioner above named, and am acquainted with the facts set forth in the foregoing petition. I have read
342 the said petition and know the contents thereof and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

G. E. WARREN

Sworn to before me this
29th day of December, 1922.
M. B. Lafounace,
Notary Public.
N. Y. County No. 8, Register's No. 4038.
Cert. filed in Bronx Co. No. 3, Reg. No. 117.
Term expires March 30th, 1924.

(Seal)

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State of New York,
County of New York, ss:

John S. Sorenson, being duly sworn says: That he is one of the petitioners above named. That he has read the foregoing petition and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JOHN S. SORENSON

Sworn to before me this 344
29th day of December, 1922.
Bernard Rosenthal,
Comm. of Deeds,
City of New York.
My comm. expires Oct. 3, 1924.

(Seal)

State of New York,
County of New York, ss:

Thorleif S. B. Nielsen, being duly sworn says: That he is one of the petitioners above named. That he has 345
read the foregoing petition and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

THORLEIF S. B. NIELSEN

Sworn to before me this
29th day of December, 1922.
Bernard Rosenthal,
Comm. of Deeds,
City of New York.
My comm. expires Oct 3, 1924.

(Seal)

346 **Exhibit M Annexed to Affidavit of Frank C. Sterck.**

Claim dated October 26, 1927, filed before the Mixed Claims Commission by the American Exchange Irving Trust Company, as successor to the Columbia Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken, against Germany and the Zentral-Einkaufs-Gesellschaft.

BEFORE THE MIXED CLAIMS COMMISSION

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UNITED STATES AND GERMANY

ORGANIZED UNDER THE AGREEMENT OF AUGUST 10, 1922,

BETWEEN THE UNITED STATES AND GERMANY

United States of America on behalf of COLUMBIA TRUST COMPANY, (now the American Exchange Irving Trust Company), as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and JOHN S. SORENSEN and THORLEIF S. B. NIELSEN, surviving partners of the firm of Crossman & Sielcken,	List No. 636 Docket No. 8305
VS.	
GERMANY AND ZENTRAL-EINKAUFSGESELLSCHAFT m. b. H., impleaded.	

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MEMORIAL FOR CLAIM

The claimants, Columbia Trust Company (now the American Exchange Irving Trust Company), John S. Sorenson and Thorleif S. B. Nielsen, citizens of the United States, respectfully show to this Commission:

(1) That Hermann Sielcken was on all pertinent dates herein, and until the time of his death on or about October 8, 1917, a citizen of the United States, residing in the United States, although temporarily residing in Germany at the time of his death (Exhibits 1, 2 and 3; Docket No. 8304); that Clara Sielcken (now Clara Sielcken Schwarz), the widow and sole beneficiary of the residuary estate of the said Hermann Sielcken, deceased (Exhibit 4, Docket No. 8304), is, and was on all pertinent dates herein, a citizen of the United States (Exhibits 1 and 2; Docket No. 8304), residing in the United States, although in Germany at the outbreak of the War, and returned to the United States in 1919 (Exhibit 2; Docket No. 8304); that John S. Sorenson and Thorleif S. B. Nielsen are citizens of the United States, and, on all pertinent dates herein, resided in the United States (Exhibits 3 and 5; Docket No. 8304); that the Columbia Trust Company (now the American Exchange Irving Trust Company), is, and was, on all pertinent dates herein, a corporation duly organized and existing under the laws of the State of New York, having its principal place of business in New York City, State of New York (Exhibit 6, Annex A; Docket No. 8304). 350

(2) That the said Hermann Sielcken, deceased, left a Last Will and Testament, wherein he named "Columbia-Knickerbocker Trust Company," executor with respect to all property left by the said Hermann Sielcken in the United States of America, and particularly with respect to the liquidation of the firm of Crossman & Sielcken, hereinafter mentioned (Exhibit 4; Docket No. 8304); that the said Columbia Trust Company is the executor named as "Columbia-Knickerbocker Trust Company" in the said Last Will and Testament (Exhibit 6, Annex A; Docket No. 8304). 351

(3) That said Last Will and Testament of Hermann Sielcken was duly admitted to probate by the Surrogates' Court of New York County in the City of New York on or about the 25th day of January, 1918; and that the said Columbia Trust Company thereupon duly qualified and

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entered upon the discharge of its duties as, and now is, such executor (Exhibit 6, Annex B; Docket No. 8304).

(4) That at all times hereinafter mentioned, up to October 8, 1917, said Hermann Sielcken, John S. Sorenson and Thorleif S. B. Nielsen were engaged in business as exporters, importers and commission merchants, as copartners doing business under the firm name and style of Crossman & Sielcken, having their principal place of business in the Borough of Manhattan, City, County and State of New York; that by their agreement of copart-
353 nership which bore date the 2nd day of June, 1913, it was provided among other things that the capital of said partnership, upon the termination of the partnership from whatever cause, should belong to said Sielcken or to his estate, and that said Sorenson and Nielsen, respectively, should have an interest in the business, consisting of a percentage of the net profits that might be realized therefrom, and that in and by said agreement of copartnership it was further provided that, upon the death of said Sielcken, it should be the duty of the surviving partners to transfer and pay over to the executor of the Will of the deceased partner his capital and the property and
354 business of the firm (Exhibit 3, Annex D; Docket No. 8304).

(5) That all of the customers and business associates of the firm of Crossman & Sielcken were duly informed, in 1913, of the creation of the new partnership of Crossman & Sielcken as aforesaid, in June, 1913 (Exhibit 3, Annex E; Docket No. 8304).

(6) That the said Hermann Sielcken, deceased, provided in his Will aforesaid that the management of the firm business for liquidation should be left in the hands of the said Sorenson and Nielsen to the largest possible degree under the supervision of the executor (Exhibit 4; Docket No. 8304).

(7) That pursuant to the provisions of said agreement of copartnership and of the Will aforesaid, upon the death

of said Hermann Sielcken, said surviving partners, Sorenson and Nielsen, did undertake to collect the assets and to proceed with the liquidation of the business and did transfer and pay over to said Columbia Trust Company, executor, the said capital and property of the said firm then in their possession and/or under their control, and which had come into their possession or control. That said Columbia Trust Company, as such executor, has ever since been and now is engaged in the supervision of the liquidation of the business of said partnership, and by reason of the foregoing, said Sorenson, 356
Nielsen and the Columbia Trust Company, executor, is, and are, entitled to collect and receive all of the assets and credits of said firm of Crossman & Sielcken and to procure and recover upon any and all causes of action and claims of whatever nature, existing in favor of such firm at the time of its dissolution, and that the said Sorenson and Nielsen in addition are entitled to receive each for his own account, twelve and one-half per cent of the net profits realized from the business (Exhibit 3, Annex D, and Exhibit 4; Docket No. 8304).

(8) That the Zentral-Einkaufsgesellschaft m. b. H., hereinafter called "Z.E.G.," is a corporation, with its 357
principal place of business at Berlin, organized under the laws of Germany in or about the month of January, 1915, with a capital stock of M. 45,000,000, of which stock the Imperial German Government originally subscribed M. 29,950,000, and the several German States M. 13,800,000, of which total capital stock the present German Government now owns all but M. 100,000; that the said Z.E.G. succeeded to, and took over, all of the business assets and liabilities of the enterprise theretofore operated by the Reichseinkauf (Empire Purchasing Agency) at Berlin (Exhibit 1).

(9) That on or about the 25th day of September, 1914, the said Reichseinkauf, entered into an agreement with Crossman & Sielcken, under the terms of which the latter were employed to purchase for account of

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Reichseinkauf mixed cargoes of wheat, tea, cocoa and mixed animal food, to be shipped by neutral vessels from American ports to neutral Baltic ports, Crossman & Sielcken to be reimbursed for the invoice price, plus freight and insurance, and to be paid a commission of 10% on the value of the cargo as indicated by the total amount of the invoice, freight and insurance (Exhibits 2 and 3).

(10) That thereafter the Reichseinkauf and Z.E.G. instructed Crossman & Sielcken to stop shipments of
359 wheat and flour and in their place to purchase pure lard, fat backs, near backs and short backs, clear backs, cakes and cereals (Exhibits 4 and 5).

(11) That pursuant to the agreement of September 25, 1914, Crossman & Sielcken purchased for account of Reichseinkauf and shipped several cargoes consigned to persons in Copenhagen, which cargoes arrived safely, and Crossman & Sielcken were duly reimbursed and paid their commission of 10% through Kuhn, Loeb & Company and the National City Bank, both of New York City. The following is a list of the shipments, the amounts of the invoices, including freight and insurance,
360 and the dates upon which Crossman & Sielcken were reimbursed and paid their commission of 10%. (Exhibit 6, page No. 3):

Date Shipped	Steamship	Amt. of Invoice Freight and Ins.	Reimbursements and Commissi Date	Amount
Nov. 13, 1914	Honda	$72,960.77	Jan. 2, 1915	$80,256.85
Nov. 13, 1914	Norfolk	31,325.66	Jan. 2, 1915	34,458.22
Nov. 20, 1914	Mirjam	25,334.49	Jan. 23, 1915	27,867.94
Nov. 20, 1914	Alexandra	77,334.87	Jan. 4, 1915	85,068.36

(12) That in November, 1914, the Reichseinkauf instructed Hermann Sielcken, then in Germany, to have shipments consigned to Harry Levin of Copehagen (Exhibits 4, 8, 9, 10 and 11).

Exhibit M Annexed to Affidavit of Frank C. Sterck

(13) That thereafter Crossman & Sielcken purchased for account of Reichseinkauf and/or Z.E.G., and shipped several cargoes consigned to Harry Levin, Copenhagen, which cargoes arrived safely, and for which Crossman & Sielcken were duly reimbursed and paid their commission of 10%. The following is a list of the shipments and the amounts of the invoices, including freight and insurance, and the dates upon which Crossman & Sielcken were reimbursed and paid their commission of 10%:

Date Shipped	Steamship	Amt. of Invoice Freight and Ins.	Reimbursements and Commissions Date	Amount
Nov. 27, 1914	Tula	$17,699.33	Jan. 15, 1915	$19,469.26
Nov. 27, 1914	Kentucky	11,041.62	Feb. 8, 1915	12,145.78
Dec. 7, 1914	Arkansas	21,154.34	Feb. 5, 1915	23,320.00
Dec. 28, 1914	Curique	19,970.47	Jan. 30, 1915	21,967.52
Jan. 4, 1915	United States	33,814.49	Jan. 30, 1915	37,195.94
Jan. 4, 1915	Dania	15,363.56	Feb. 13, 1915	18,683.56

(14) That in the spring of 1915, Z.E.G. instructed Crossman & Sielcken to ship, consigned to Messrs. Beckman & Jorgensen, of Copenhagen, the shipments purchased for account of Z.E.G. (Exhibits 11 and 12).

(15) That certain shipments of merchandise, purchased for account of Z.E.G., were made by Crossman & Sielcken on the vessels listed below, and consigned to Harry Levin or Messrs. Beckmann & Jorgensen, pursuant to said Agreement, and were seized by the British Naval authorities and were condemned in the British Prize Court as lawful prizes. Crossman & Sielcken have not been reimbursed for the invoice value of the cargoes, insurance and freight, nor paid any part of their 10% commission on said shipments, except for the cargo shipped on March 9, 1915, on the S.S. *United States*, for which reimbursement and commission in full has been received, and except for the sum of $8,050.44 on cargo

shipped on the S.S. *Oscar II* (Exhibit 6, pages 5 and 6, and Exhibit 7, Annex A):

S.S. *Hilding,* sailed February 27, 1915, consigned to Harry Levin.

S.S. *United States,* sailed March 9, 1915, consigned to Harry Levin.

S.S. *Arkansas,* sailed March 23, 1915, consigned to Harry Levin.

S.S. *Hellig Olav,* sailed March 30, 1915, consigned to Harry Levin.

S.S. *Gunborg,* sailed April 13, 1915, consigned to Harry Levin.

S.S. *Indianic,* sailed April 23, 1915, consigned to Beckmann & Jorgensen.

S.S. *Oscar II,* sailed April 28, 1915, consigned to Beckmann & Jorgensen.

(16) That claim is herein made for reimbursement of the invoice value, freight, insurance, and for payment of the commissions due and owing Crossman & Sielcken on the above mentioned shipments, under the terms of said agreement of September 25, 1914, in the total amount of $380,761.54, which said debt is computed as follows (Exhibit 6, page 7, and Exhibit 7):

Steamship	Amt. of Invoice Freight and Ins.	Amount of Commission	Total	Due Date
Hilding	$95,578.29	$9,557.83	$105,136.12	Apr. 27, 1915
Arkansas	48,686.81	4,868.68	53,555.49	Apr. 17, 1915
Hellig Olav	28,105.99	2,810.60	30,916.59	Apr. 17, 1915
Gunborg	43,997.16	4,399.72	48,396.88	June 13, 1915
Indianic	53,471.31	5,347.13	58,818.44	June 23, 1915
Oscar II	83,625.87	8,362.59	91,988.46	May 11, 1915
			$388,811.98	
Less payment crackers and cereals on S.S. Oscar II			8,050.44	
NET AMOUNT DUE			$380,761.54	

(17) That claimants have not been reimbursed and have not received any compensation through insurance or otherwise, for the above cargoes (Exhibit 6, page 7).

(18) That the following books of original record of the firm of Crossman & Sielcken are submitted in support of this claim for examination by the Commission, the return of which is respectfully requested, when they have served their purpose:

Brazil Ledgers J and K.
Invoice books, Brazil Department, No. 138, 139 and 140. 368
African order book, miscellaneous, No. 61.
Export Journal F.
Abstract Book, No. 26.

WHEREFORE, the Columbia Trust Company (now the American Exchange Irving Trust Company), John S. Sorenson and Thorleif S. B. Nielsen, claimants, respectfully make claim against the Government of Germany under the Treaty of Berlin of August 25, 1921, upon the facts herein set forth and the evidence filed in support thereof, in the amount of $380,761.54, together with interest at the rate of 5% per annum on $84,472.08 thereof from April 17, 1915; on $105,136.12 thereof from April 27, 1915; on $83,938.02 thereof from May 11, 1915; on $48,396.88 thereof from June 13, 1915, and on the remaining $58,818.44 thereof from June 23, 1915, to the date of payment respectively, as provided for in said Treaty, together with a proper allowance for expenses and attorneys' fees, and such other and further relief as this Commission may deem just and equitable. 369

Dated, October 26, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY, formerly the COLUMBIA TRUST COMPANY, as Executor of the Last Will and Testament of Hermann Sielcken, deceased.

By: Orrin R. Judd,
Vice-President.

JOHN S. SORENSON,
THORLEIF S. B. NIELSEN.

(Seal)

ATTEST:
H. Major
Asst. Secy.

370 *Exhibit M Annexed to Affidavit of Frank C. Sterck*

State of New York,
County of New York, ss:

Orrin R. Judd, being duly sworn, says:

I am a Vice-President of the American Exchange Irving Trust Company, formerly the Columbia Trust Company, which, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, is one of the claimants above named, and am acquainted with the facts set forth in the foregoing memorial. I have read said memorial and know the contents thereof and the same is true
371 to my own knowledge, except as to the facts therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

ORRIN R. JUDD.

Sworn to before me this
26 day of October, 1927.
G. E. Osborn,
Notary Public,
Queens Co. No. 1298.
Cert. filed in N. Y. Co. No. 102, Reg. No. 8064.
" " " Bronx Co. No. 6, Reg. No. 2824.
372 " " " Kings Co. No. 37, Reg. No. 8041.
Term expires March 30, 1928.

(Seal)

State of New York,
County of New York, ss:

John S. Sorenson, being duly sworn, says:

That he is one of the claimants above named; that he has read the foregoing memorial and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and

belief and that as to those matters he believes it to be true.

JOHN S. SORENSON.

Sworn to before me this
26 day of October, 1927.
Emilie B. Bender,
Notary Public,
Kings Co. No. 148.
Cert. filed in N. Y. County No. 340.
New York Register's No. 8293.
My Commission expires March 30, 1928. 374
(Seal)

State of New York,
County of New York, ss:

Thorleif S. B. Nielsen, being duly sworn, says:

That he is one of the claimants above named; that he has read the foregoing memorial and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true. 375

THORLEIF S. B. NIELSEN.

Sworn to before me this
27 day of October, 1927.
Emilie B. Bender,
Notary Public,
Kings Co. No. 148.
Cert. filed in N. Y. County No. 340.
New York Register's No. 8293.
My Commission expires March 30, 1928.

(Seal)

376 **Exhibit N Annexed to Affidavit of Frank C. Sterck.**

Answer of German Government, dated October 15, 1928, filed through its Agent, Karl von Lewinski, before the Mixed Claims Commission.

BEFORE THE MIXED CLAIMS COMMISSION

UNITED STATES AND GERMANY

Organized Under the Agreement of August 10, 1922 Between the United States and Germany.

377

UNITED STATES OF AMERICA on behalf of COLUMBIA TRUST COMPANY (now the American Exchange—Irving Trust Company), as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and JOHN S. SORENSON and THORLEIF S. B. NIELSEN, surviving partners of the firm of Crossman & Sielcken,	Docket No. 8305 List No. 636
VS.	
378 GERMANY and ZENTRAL-EINKAUFSGESELLSCHAFT m. b. H., Impleaded.	

ANSWER OF THE GERMAN AGENT UNDER RULE IV-b (1)

Note: The "Memorial" referred to in the present Answer is the "Memorial for Claim" prepared and submitted by the claimants, which "Memorial for Claim" is attached as "Annex I" to the "Memorial of the United States in Support of the Claim" filed by the Agent of the United States.

Exhibit N Annexed to Affidavit of Frank C. Sterck 379

I. Statement As to Facts.

The facts as stated in the Memorial will not be disputed, with the following exceptions:

(a) In Par. (1) of the Memorial it is contended that Hermann Sielcken was, on all dates pertinent herein and until the time of his death on or about October 8, 1917, a citizen of the United States, "residing in the United States, although temporarily residing in Germany at the time of his death"; it is also contended that Clara Sielcken is, and was on all dates pertinent herein, a citizen of the United States, "residing in the United States, although in Germany at the outbreak of the War." These contentions are contradicted by the facts that the late Hermann Sielcken and his wife owned, maintained and inhabited a palatial estate near Baden-Baden (Germany), while in New York they had merely a suite in a hotel; that in the Last Will and Testament of March 23, 1914 (Docket No. 8304, Exhibit 4), which Last Will and Testament was apparently made in New York, Hermann Sielcken called himself "Hermann Sielcken, of Baden-Baden, Germany"; that in the same Will he directed that all of his estate should be administered and distributed in Germany, under the laws and in the tribunals of "Germany, my domicile"; and that in the Decree of the Surrogate's Court of the County of New York of January 26, 1918 (Docket No. 8304, Exhibit 6-B), admitting the said Will to probate, it was expressly stated that Hermann Sielcken was at the time of his death "a resident of Baden-Baden, Germany."

380

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(b) In Par. (2) of the Memorial it is contended that Hermann Sielcken "left a Last Will and Testament, wherein he named 'Columbia-Knickerbocker Trust Company' executor with respect to all property left by the said Hermann Sielcken in the United States of America, and particularly with respect to the liquidation of the firm of Crossman & Sielcken * * *"

This statement is neither accurate nor complete. The pertinent provisions of said Will read as follows:

382 *Exhibit N Annexed to Affidavit of Frank C. Sterck*

"I appoint Gustav Di derichsen, and his brother Heinrich Diederichsen of Kiel, Germany, and my brothers-in-law, Carl Isenberg and Richard Isenberg, residing in Germany, the executors of this my will.

"I also appoint the Columbia Knickerbocker Trust Company of New York, executor of this will, for the purpose of collecting and converting into cash all my property situated in the United States of America, and I direct said Company to transmit and pay over all the net proceeds thereof to my said executors in Germany for administration and distribution by them.

383 "It is my wish that all my estate should be administered and distributed in Germany, under the laws and in the tribunals of Germany, my domicile.

* * * * * *

"Whereas, since the death of my late partner, George W. Crossman, in the firm name of Crossman & Sielcken, I have become the sole owner of the property and business of that firm and I have admitted into partnership John S. Sorenson and Thorlief S. B. Nielsen to continue the business of the said late firm under the same firm name; and the Articles of Co-partnership made between us, bearing date the "2nd day of June, 1913, provided that in case
384 of my death, the said partnership shall come to an end and that it shall then be the duty of the surviving partners to transfer and pay over to the executor of my Will all the capital property and business of the said firm,

"It is my desire that my executor, the Columbia Knickerbocker Trust Company should leave the management of the firm business for liquidation in the hands of the said Sorenson and Nielsen, to the largest possible degree under the direct supervision of the said trust Company."

This language shows that the task entrusted to the Columbia-Knickerbocker Trust Company was more restricted than would appear from the above statement in the Memorial.

The Memorial fails to mention the essential fact that the Will of March 23, 1914, was superseded by a subsequent Joint Will of Hermann Sielcken and his wife, made

at Baden-Baden on February 18, 1917 (Docket No. 8304, Exhibit 8, Annex A), wherein the appointment of the Columbia Knickerbocker Trust Company was revoked.

It should also be added that on March 23, 1920, an agreement was concluded between the German executors, the Columbia Trust Company, and the widow of Hermann Sielcken, the purpose of which agreement apparently was to avoid disputes as to the validity of the administrative acts of the Columbia Trust Company and to facilitate and expedite the liquidation of the estate (docket No. 8304, Exhibit 6, Annex C).

386

(c) In Par. (3) of the Memorial it is contended that after the Will of March 23, 1914, had been admitted to probate the Columbia Trust Company "duly qualified and entered upon the discharge of its duties as, and now is, such executor."

Even assuming that the Columbia Trust Company did acquire the legal status of executor, the contention that said Company "now is executor" would not be supported by the evidence on record. The record is silent as to the activities of the Columbia Trust Company in its alleged capacity as executor, regarding the progress made in the liquidation of the estate, and regarding the ultimate fate of the net proceeds thereof. The Columbia Trust Company is requested to make a full and detailed statement covering these points which statement should be accompanied by documentary evidence to support its correctness. The Columbia Trust Company is especially requested to state whether it ever made a final report or accounting to the Surrogate's Court or to the Alien Property Custodian, to the German executors or to the residuary heir, and whether it was ever discharged by any of these agencies and/or persons.

387

(d) A similar disclosure is requested concerning the activities of the claimants John S. Sorenson and Thorleif S. B. Nielsen with regard to whom it is contended in Par. (7) of the Memorial that, in their capacity as liquidators, they are still entitled "to collect and receive all of the assets and credits of said firm of Crossman & Sielcken

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and to procure and recover upon any and all causes of action and claims of whatever nature, existing in favor of such firm at the time of its dissolution * * *"

It is pertinent to remark, in this connection, that in a cable to the firm of Theodor Wille under date of February 4, 1928, Mr. Nielsen stated: "* * * I have had nothing to do with the liquidation since estate settled with me in June nineteen hundred twentyone * * *"

(e) In Pars. (8) to (17) of the Memorial, reference is made to the business transacted by the firm of Crossman
389 & Sielcken with the Reichseinkauf and/or the Zentral-Einkaufsgesellschaft m. b. H. However, the Memorial omits the essential fact that the disputes resulting from this business were made the subject of an arbitration between the German executors of the Sielcken Estate and the Z. E. G.; that the Court of Arbitration entered an interlocutory decision on May 31, 1918, and that on the basis of this decision, a compromise was concluded whereby the loss incurred was divided between the parties, the German executors waiving all further claims against the Z. E. G. (Exhibits a-m filed herewith).

II. Issues of Law.

390

A. The record fails to show that either the Columbia Trust Company or John S. Sorenson or Thorleif S. B. Nielsen is entitled to make the present claim.

(1) The Columbia Trust Company has never been executor of the Hermann Sielcken Estate. The Letters Testamentary granted unto the Columbia Trust Company by the Surrogate's Court of the County of New York, on January 26, 1918 (Docket No. 8304, Exhibit 6, Annex B), were manifestly issued in ignorance of the Joint Testament of February 18, 1917 (Docket No. 8304, Exhibit 8, Annex A), superseding the Testament of March 23, 1914 (Docket No. 8304, Exhibit 4). The said Letters Testamentary were, therefore, devoid of legal effect.

The agreement of March 23, 1920 (Docket No. 8304, Exhibit 6, Annex C), could not possibly vest in the Columbia

Trust Company the legal character of executor not provided for in the Will of Hermann Sielcken. Whatever may have been the intention of this instrument, its legal effect was, at best, to ratify the preceding administrative acts of the Columbia Trust Company and to confer upon the said Columbia Trust Company a limited power of attorney derived from the authority of the German executors.

Even under the assumption that the Columbia Trust Company did obtain the position of executor of the Will of Hermann Sielcken, deceased, of March 23, 1914, the 392
record fails to support the contention that the authority to act in such capacity still exists. And even under the assumption that such authority still attaches to the Columbia Trust Company, the said authority would not include the right to collect the alleged debt under consideration, for the reason that said debt is not a part of the property of Hermann Sielcken, deceased which is "situated in the United States of America."

It is pertinent to state here that the parallel claim which is pending before the District Court of the Southern District of the State of New York and which has been filed on the identical facts that form the basis of the instant claim, was not presented by the Columbia Trust 393
Company but by John S. Sorenson and Thorleif S. B. Nielsen alone, in their alleged capacity as surviving partners of the firm of Crossman & Sielcken.

(2) The right of John S. Sorenson and Thorleif S. B. Nielsen to make the present claim in their alleged capacity of *liquidators* of the firm of Crossman & Sielcken, will depend on the question whether or not the liquidation proceedings are still pending and whether said Sorenson and Nielsen have ever been discharged.

That John S. Sorenson and Thorleif S. B. Nielsen are not entitled to make the present claim in their capacity of *partners* of the firm of Crossman & Sielcken, is manifest from the record as it stands. According to the Partnership Agreement (Docket No. 8304, Exhibit 2, Annex D), John S. Sorenson and Thorleif S. B. Nielsen never

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had any right or interest of their own in any property or other asset belonging to the firm of Crossman & Sielcken. The entire business capital was owned by Hermann Sielcken alone, and he alone had to bear and pay all losses of the firm. After the partnership had been dissolved by the death of Hermann Sielcken, the entire business capital became a part of the Hermann Sielcken Estate. There was no liquidation of the firm in the sense of a distribution of the business capital among the surviving members of the dissolved partnership. Under Article 11 of the Partner-
395 ship Agreement, the surviving partners had merely to transfer and pay over to the executor of Hermann Sielcken the capital and also all property and business of the firm. It is illustrative, in that respect, that apparently the entire business capital of the firm of Crossman & Sielcken was taken over by the Alien Property Custodian under the Trading with the Enemy Act, no exception being made with regard to any portion of the business capital in favor of Messrs. Sorenson & Nielsen. The interest of John S. Sorenson and Thorlief S. B. Nielsen was confined absolutely to their share of 12-1/2 per cent of the net profits of the business.

Assuming that the alleged debt exists and, furthermore,
396 that the collection of such debt would increase the net income for the last business year, the only right of said Sorenson and Nielsen would be that of making claim against the Estate of Hermann Sielcken for their share in such additional net profits of the business. Whether or not even such a claim could be asserted is doubtful in the light of the provision of Article XIII of the Partnership Agreement. According to this Article, neither of the two persons in question is entitled to bring any action against the Estate of Hermann Sielcken for any share is the profits of the business, other than or different from that fixed and established by the balance sheets.

B. The claim is contested for the further reason that the compromise concluded by the German executors with regard to the legal relations between the Hermann Sielcken Estate and the Z. E. G. is binding upon the firm of

Crossman & Sielcken in liquidation. This defense will be based on the following alternative considerations:

(1) Under the Partnership Agreement all assets and liabilities of the firm of Crossman & Sielcken became, upon the death of Hermann Sielcken, assets and liabilities of his estate, which estate was subject, under the Will of February 18, 1917 (Docket No. 8304, Exhibit 8, Annex A), to the sole administration of the four German executors appointed in said Will. Assuming that the claimants herein had authority to administer that part of the estate which had formerly been the business capital of the firm 398
of Crossman & Sielcken, such authority was derived from the authority of the German executors. Even under that assumption, the claimants were legally bound by the decisions of the German executors.

(2) Even under the New York testament (Docket No. 8304, Exhibit 4), the authority of the Columbia-Knickerbocker Trust Company was restricted to the activities connected with collecting and converting into cash all of Hermann Sielcken's property located in the United States of America, after completion of which the said Company was directed to transmit and pay over all the net proceeds to the German executors for administration and 399
distribution. It follows that even under this Will, the German executors had control of the entire estate. The Columbia Trust Company was merely an instrument for facilitating the technicalities of the liquidation of Hermann Sielcken's property in the United States. Even under this Will, the Columbia Trust Company was subordinate to the German executors, and it must be assumed that the decisions of said executors are binding upon the Columbia Trust Company.

(3) Moreover, it appears from the record that the compromise whereby the German executors renounced all rights against the Z. E. G. was ratified by the Columbia Trust Company and/or John S. Sorenson and/or Thorleif S. B. Nielsen, at least by implication. In this connection, the following points are material:

400 *Exhibit N Annexed to Affidavit of Frank C. Sterck*

(a) In the summer of the year 1919 Mr. Nielsen was in Hamburg for the purpose of discussing the affairs of the Hermann Sielcken Estate. It can hardly be doubted that the compromise concluded by the German executors was discussed on that occasion. There is nothing to indicate that Mr. Nielsen protested.

(b) In August, 1919, the situation of the Sielcken property in Germany was further discussed by Mr. Hotchkiss, for many years a friend and legal adviser to Mrs. Sielcken, with the German executors and their counsel, Dr.
401 Kaemmerer. It can scarcely be assumed that the compromise effected between the German executors and the Z. E. G. remained undiscussed on that occasion. There is no indication of a protest by Mr. Hotchkiss.

(c) In a letter dated March 23, 1920, to the firm of Crossman & Sielcken in liquidation, Mr. Theodor Wille of Hamburg referred to the arbitration which had been resorted to in connection with the disputes with the Z. E. G. In the reply letter of May 21, 1920, Nielsen, signing on behalf of Crossman & Sielcken in liquidation, took note of the communication without making any protest (Exhibits m and n).

402 (d) One-half of the loss sustained by the firm of Crossman & Sielcken in connection with the Z. E. G. transaction was charged to the firm of Theodor Wille. There is nothing to indicate that such charge was made with a reservation, which would indicate that the loss was considered final by the claimants herein.

(e) Finally, a conclusive ratification of the compromise concluded by the German executors must be found in the attitude adopted by the claimants herein in the proceedings before the Mixed Claims Commission. It appears that up to the end of the war, all persons interested in the matter under consideration were in perfect harmony. They were connected by close relationship or by bonds of intimate friendship. In this situation it was obviously quite unexpected when the Columbia Trust Company—a mere instrument in the hands of the German executors—

filed with the Mixed Claims Commission claims against the Z. E. G. and Theodor Wille. Upon the complaint of Theodor Wille, which made reference to an understanding with Mrs. Schwarz (the only residuary heir), John S. Sorenson and Thorleif S. B. Nielsen promptly withdrew their claim (Exhibit o). Mr. Leonard B. Smith, counsel employed by the Columbia Trust Company, confirmed that immediate steps had been taken "to discontinue the annoyance to Mr. Diederichsen." In the same letter Mr. Smith explained that when the claim was filed it was thoroughly understood that it was only being filed for 404
the protection of the executor and that the claim would probably never be prosecuted (Exhibit p). To the same effect is a letter written by Messrs. Sorenson and Nielsen to Mr. Theodor Wille, under date of February 2, 1924 (Exhibit q). On February 7, 1924, the German Agency was formally notified by the American Agency that the claim had been officially withdrawn (Exhibit s). In this situation, there can be no doubt that all persons concerned were fully conversant with the question under discussion, and the formal abandonment of the claim must be accepted as a conclusive ratification of the compromise concluded by the German executors. If, in spite of this state of facts, the claimants intend to dispute the binding 405
force of the compromise, they should explain fully the events leading up to the reinstatement of the claim, which occurred almost four years after its formal abandonment (Exhibit t). The claimants are requested to produce a complete statement of these events, which statement should be accompanied by a full disclosure of all correspondence referring thereto which was exchanged between claimants and the German executors, the residuary heir and the respective counsel of these persons, and of all memoranda in the possession of any of such persons, having to do with conferences at which this question was discussed.

C. In the alternative, the claim will be contested for the reason that the Z. E. G. would be under no legal obligation to make the payment demanded in the instant claim

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even if the compromise concluded with the German executors were not binding. The legal basis for this defense will be found in the arbital decision filed herewith as Exhibit d.

(Sgd) KARL von LEWINSKI
Agent of Germany.

Washington, D. C.

October 15, 1928

Of Counsel:
407 (Sgd.) M. v. d. Decken

408

Exhibit O Annexed to Affidavit of Frank C. Sterck. 409

Claim No. 38530 filed with the Alien Property Custodian on October 29, 1927, by the American Exchange Irving Trust Company, Executor of the Last Will and Testament of Hermann Sielcken, deceased, and by Sorenson and Nielsen, as Liquidators of the firm of Crossman & Sielcken.

Alien Property Custodian
Received Oct. 29, 1927
Noted
Ans'd. M. O. D.
Date 10/29/27

This claim must be filed in duplicate and one copy at least must be properly executed and the execution authenticated. Send both copies with any supporting documents to 410

Do Not Fill Out This Page.

ALIEN PROPERTY CUSTODIAN
Washington, D. C.

ALIEN PROPERTY CUSTODIAN.

NOTICE OF CLAIM PURSUANT TO SECTION 9 OF "TRADING WITH THE ENEMY ACT."

411

Claim No. 38530

Trust No. 592

Claimant. American Exchange Irving Trust Co.

Record Ownership.

Adverse.

Debt.

Reporter.

A.P.C.
Claim Section
Received
Oct. 29, 1927
Referred to.....
Answered .....
Date .....
No. .....

412 *Exhibit O Annexed to Affidavit of Frank C. Sterck*

To HOWARD SUTHERLAND,
ALIEN PROPERTY CUSTODIAN,
Washington, D. C.

The undersigned, hereinafter referred to as claimant, desiring to take advantage of section 9 of the "Trading with the Enemy Act," hereby gives you notice of claim as follows, and hereby agrees to furnish such other information and proof as you may require.

1. Name of claimant (individual, partnership, association, corporation): American Exchange Irving Trust Company (formerly known as Columbia Trust Company), John S. Sorenson, Thorleif S. B. Nielsen.

413

2. Address of claimant: American Exchange Irving Trust Company, Columbia Branch, 60 Broadway, New York City, John S. Sorenson, 64 Water Street, New York City, Thorleif S. B. Nielsen, 101 Front Street, New York City.

3. Name of person (formerly determined an enemy or ally of enemy) whose property is affected by this claim: Zentral-Einkaufsgesellschaft, m. b. H.

414

4. Residence or last known address of person named in paragraph 3: 21 Behrenstrasse, Berlin, Germany

5. Name of any other persons, if known to claimant, who have any interest whatever in within claim: no entry

6. Address or addresses of such person or persons: .....

7. If the claim, notice of which is hereby given, is made for certain specific property, or for an interest in property, the following questions must be answered: .....

(a) The said property was conveyed, transferred, assigned, or delivered to Alien Property Custodian by:

Address .....
(No.) (Street) (City) (Country)

Exhibit O Annexed to Affidavit of Frank C. Sterck 415

(b) The following is an accurate description of the property affected by this notice of claim (this description must be sufficiently complete to identify the property):

8. The nature of the claim, notice of which is hereby given, is as follows: (If the claim is for only part of the property, describe that part; if of an interest, state precisely what the interest is; if of a debt, state fully the nature thereof, how it is evidenced, and whether there are any set-offs or counterclaims. Attach verified copies of all papers relied on to support claim.) (See Annex A) 416

9. The claimant represents and alleges that claimant now and since (See Annex B) ..... has
(Date)

been a .....
(Citizen, corporation, association, partnership)

of ..... and is the
(Country, nation, or free city)

owner of the property claimed and entitled to the return of such property or payment under the provisions of Section 9 of the "Trading with the Enemy Act," that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the Enemy Act"; that the claim herein referred to is in all respects 417

418 *Exhibit O Annexed to Affidavit of Frank C. Sterck*

bona fide, and that there are no set-offs, counterclaims, or defenses, except as herein stated.

Dated October 26, 1927

AMERICAN EXCHANGE IRVING TRUST COMPANY
By Orrin R. Judd
Vice President

(Signature of party making claim)

JOHN S. SORENSON
THORLEIF S. B. NIELSEN

(Seal)

419

(Partnerships should sign by member or duly authorized representative. Corporations or associations should sign by officer or duly authorized representative, and should affix corporate or official seal.)

Attest H Major
Assistant Secretary

ANNEX A.

8. Claim is made for a balance of $380,761.54, with interest, due claimants American Exchange Irving Trust
420 Company (formerly known as Columbia Trust Company), executor of the last Will and Testament of Hermann Sielcken, deceased, and claimants Sorenson and Nielsen, as liquidators of the firm of Crossman & Sielcken, an American co-partnership, composed of Hermann Sielcken, deceased, John S. Sorenson and Thorleif S. B. Nielsen. The claim arises out of the following transactions:

In September, 1914, Crossman & Sielcken were employed by the Reichseinkauf to purchase for its account mixed cargoes of food stuffs to be shipped by neutral vessels from American ports to neutral Baltic ports, Crossman & Sielcken to be reimbursed for the invoice price, plus freight and insurance and to be paid a commission of 10% on the value of the cargo as indicated by the total amount of the invoice, freight and insurance.

In January, 1915, the business of the Reichseinkauf

was taken over by Zentral-Einkaufsgesellschaft and pursuant to its instructions Crossman & Sielcken purchased for account of Zentral-Einkaufsgesellschaft and shipped upon the vessels hereinbelow named, merchandise of which the invoice price, freight and insurance and commissions were of the amounts hereinbelow designated, no part of which has been reimbursed or paid to Crossman & Sielcken, except the sum of $8,050.44:

422

Steamship	Amt. of Invoice Freight & Ins.	Amount of Commission	Total	Due Date
Hilding	$95,578.29	$9,557.83	$105,136.12	April 27, 1915
Arkansas	48,686.81	4,868.68	53,555.49	April 17, 1915
Hellig Olav	28,105.99	2,810.60	30,916.59	April 17, 1915
Gunborg	43,997.16	4,399.72	48,396.88	June 13, 1915
Indianic	53,471.31	5,347.13	58,818.44	June 23, 1915
Oscar II	83,625.87	8,362.59	91,988.46	May 11, 1915
			$388,811.98	
Less payment crackers and cereals on SS Oscar II			8,050.44	
Net Amount Due			$380,761.54	

423

A. P. C.
Claim Section
Received
Oct 29 1927
Referred to
Answered
Date
No.

Claimants have not been reimbursed and have not received any compensation through insurance or otherwise for the above cargoes except as above noted and there are no set-offs or counterclaims.

424 *Exhibit O Annexed to Affidavit of Frank C. Sterck*

ANNEX B.

9. Claimants represent and allege that claimant, American Exchange Irving Trust Company (formerly known as Columbia Trust Company) now and since its incorporation under the laws of the State of New York in 1871, has been a corporation of the State of New York; that claimant, John S. Sorenson, now and since February 24, 1887, has been a citizen of the United States of America and that claimant, Thorleif S. B. Nielsen, now
425 and since October 5, 1886, has been a citizen of the United States of America and said claimants are entitled to the payment of said debt under the provisions of Section 9 of the "Trading with the Enemy Act"; that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the Enemy Act"; that the claim herein referred to is in all respects bona fide and that there are no set-offs, counterclaims or defenses, except as herein stated.

426

A. P. C.
Claim Section
Received
Oct 29 1927
Referred to
Answered
Date
No.

Exhibit O Annexed to Affidavit of Frank C. Sterck 427

AFFIDAVIT OF INDIVIDUAL MAKING CLAIM.

State of New York
County of New York ss:

I swear (or affirm) that the foregoing statements are true and correct.

JOHN S. SORENSON

Subscribed and sworn to before me this 26 day of October, 1927

428

EMILIE B. BENDER
Emilie B. Bender
Notary Public
Kings County No. 148
Cert. filed in N. Y. County No. 340
New York Register's No. 8293
My Commission expires March 30, 1928

(Seal)

AFFIDAVIT OF MEMBER OR REPRESENTATIVE OF PARTNERSHIP MAKING CLAIM. 429

State of .....

ss:

County of .....

I swear (or affirm) that I am ..... of the partnership making foregoing claim, and that the foregoing statements are true and correct.

.....

Subscribed and sworn to before me this ..... day of ....., 192

.....

.....

430 *Exhibit O Annexed to Affidavit of Frank C. Sterck*

AFFIDAVIT OF OFFICER OR REPRESENTATIVE OF CORPORATION OR ASSOCIATION MAKING CLAIM.

State of New York
County of New York ss:

I swear ~~or affirm~~ that I am ~~the~~ Vice President of the corporation ~~association~~ making the foregoing claim, and that the foregoing statements are true and correct.

ORRIN R. JUDD

431 Subscribed and sworn to before me this 26th day of October, 1927

G. E. OSBORNE
G. E. Osborne
Notary Public,

Queens County No. 1298
Cert. filed in N. Y. Co. No. 102 Reg. No. 8064
Cert. filed in Bronx Co. No. 6 Reg. No. 2924
Cert. filed in Kings Co. No. 37, Reg. No. 8041
Term expires March 30, 1928

(Seal)

State of New York
432 County of New York ss:

I swear that the foregoing statements are true and correct.

THORLEIF S. B. NIELSEN

Subscribed and sworn to before me this
27th day of October 1927.
Emilie B. Bender
Emilie B. Bender
Notary Public
Kings County No. 148
Cert. filed in N. Y. County No. 340
New York Register's No. 8293
My Commission expires March 30, 1928
(Seal)

A. P. C.
Claim Section
Received Oct. 29, 1927
Referred to .....
Answered .....
Date .....

Exhibit P Annexed to Affidavit of Frank C. Sterck. 433

Letter dated October 27, 1927 to Alien Property Custodian from Barnes, Avery & Whiting, enclosing Claim No. 38530.

Telephone: Rector 1703-1704

Cable Address: Averwh

BARNES, AVERY & WHITING

100 Broadway

Brainard Avery
Earl B. Barnes
Jay E. Whiting
Geo. O. Castell

434

Alien Property Custodian
Received Oct. 29, 1927
Noted 11/1/27 Date.....
Ans'd B. J. Date.....

New York October 27th, 1927.

Hon. Howard Sutherland,
Alien Property Custodian,
Washington, D. C.

Dear Sir:

435

re: American Exchange Irving Trust Company v. Alien Property Custodian, *et al.*

We beg to file herewith duplicate notice of claim for the recovery of a debt due from Zentral-Einkaufsgesellschaft, which claim is made against property of that corporation seized by the Alien Property Custodian and held by him or by the Treasurer of the United States. This notice is served pursuant to Section 9, subsection (a) of the "Trading with the Enemy Act," as amended.

Please note that we do not intend to make application to the President for the allowance of this claim but will proceed to institute the suit in equity as prescribed in the statute, for the enforcement of the same.

436 *Exhibit P Annexed to Affidavit of Frank C. Sterck*

Will you be good enough to acknowledge receipt of the filing of this claim and oblige.

Very truly yours,

BARNES AVERY & WHITING

B/M Attys for Claimants.

A. P. C.
Claim Section
Received
Oct. 29, 1927

437 Referred to .....
Answered .....
Date .....
No. .....

438

Exhibit Q Annexed to Affidavit of Frank C. Sterck. 439

Claim No. 38566, dated November 12, 1927, filed with the Alien Property Custodian by John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken.

This claim must be filed in duplicate and one copy at least must be properly executed and the execution authenticated. Send both copies with any supporting documents to

ALIEN PROPERTY CUSTODIAN 440

WASHINGTON, D. C.

(Do not fill out this page.)

441

442 *Exhibit Q Annexed to Affidavit of Frank C. Sterck*

ALIEN PROPERTY CUSTODIAN.

NOTICE OF CLAIM PURSUANT TO SECTION 9 OF "TRADING WITH THE ENEMY ACT."

Claim No. 38566

443 Trust No. 592

Claimant. John S. Sorenson and Thorleif

Record Ownership.

Adverse.

Debt.

Reporter.

444

A. P. C.
Claim Section
Received
Nov. 12, 1927
Referred to .....
Answered .....
Date .....
No. .....

To Howard Sutherland,
Alien Property Custodian,
Washington, D. C.

The undersigned, hereinafter referred to as claimant, desiring to take advantage of section 9 of the "Trading with the Enemy Act," hereby gives you notice of claim,

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~~and makes application to the President for the allowance thereof,~~ as follows, and hereby agrees to furnish such other information and proof as you may require.

1. Name of claimant (individual, partnership, association, corporation): John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken.

2. Address of claimant: John S. Sorenson, 64 Water Street, New York City. Thorleif S. B. Nielsen, 101 Front Street, New York City. 446

3. Name of person (formerly determined an enemy or ally of enemy) whose property is affected by this claim: Zentral-Einkaufsgesellschaft, m. b. H.

4. Residence or last known address of person named in paragraph 3: 21 Behrenstrasse, Berlin, Germany.

5. Name of any other persons, if known to claimant, who have any interest whatever in within claim: no entry

6. Address or addresses of such person or persons: .....

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7. If the claim, notice of which is hereby given, is made for certain specific property, or for an interest in property, the following questions must be answered: .....

(a) The said property was conveyed, transferred, assigned, or delivered to Alien Property Custodian by:

.....

Address .....

(No.) (Street) (City) (Country)

(b) The following is an accurate description of the property affected by this notice of claim (this description must be sufficiently complete to identify the property):

.....

.....

.....

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8. The nature of the claim, notice of which is hereby given, is as follows: (If the claim is for only part of the property, describe that part; if of an interest, state precisely what the interest is; if of a debt, state fully the nature thereof, how it is evidenced, and whether there are any set-offs or counterclaims. Attach verified copies of all papers relied on to support claim.)

(See Annex A)

9. The claimant represents and alleges that claimant

449 now and since (See Annex B) .....
(Date)

has been a .....
(Citizen, corporation, association, partner-

..... of .....
ship) (Country, nation, or free city)

and is the owner of the property claimed and/or entitled to the return of such property or payment under the provisions of Section 9 of the "Trading with the Enemy Act," that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that

450 this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the Enemy Act"; that the claim herein referred to is in all respects bona fide, and that there are no set-offs, counterclaims, or defenses, except as herein stated.

Dated November 11th, 1927

(Signature of party making claim)

JOHN S. SORENSON
THORLEIF S. B. NIELSEN
(Partnerships should sign by member or duly authorized representative Corporations or associations shou sign by officer or duly authoriz representative, and should affix c porate or official seal.)

(Seal)

Exhibit Q Annexed to Affidavit of Frank C. Sterck

ANNEX A.

8. Claim is made for a balance of $380,761.54, with interest, due claimants, Sorenson and Nielsen, as the surviving partners of the firm of Crossman & Sielcken, an American co-partnership, composed of Herman Sielcken, deceased, John S. Sorenson and Thorleif S. B. Nielsen. The claim arises out of the following transactions:

In September, 1914, Crossman & Sielcken were employed by the Reichseinkauf to purchase for its account mixed cargoes of food stuffs to be shipped by neutral vessels from American ports to neutral Baltic ports, Crossman & Sielcken to be reimbursed for the invoice price, plus freight and insurance and to be paid a commission of 10% on the value of the cargo as indicated by the total amount of the invoice, freight and insurance.

In January, 1915, the business of the Reichseinkauf was taken over by Zentral-Einkaufsgesellschaft and pursuant to its instructions Crossman & Sielcken purchased for account of Zentral-Einkaufsgesellschaft and shipped upon the vessels hereinbelow named, merchandise of which the invoice price, freight and insurance and commissions were of the amounts hereinbelow designated, no part of which has been reimbursed or paid to Crossman & Sielcken, except the sum of $8,050.44:

Steamship	Amt. of Invoice Freight & Ins.	Amount of Commission	Total	Due Date
Hilding	$95,578.29	$9,557.83	$105,136.12	April 27, 1915
Arkansas	48,686.81	4,868.68	53,555.49	April 17, 1915
Hellig Olav	28,105.99	2,810.60	30,916.59	April 17, 1915
Gunborg	43,997.16	4,399.72	48,396.88	June 13, 1915
Indianic	53,471.31	5,347.13	58,818.44	June 23, 1915
Oscar II	83,625.87	8,362.59	91,988.46	May 11, 1915
		35,346.55	$388,811.98	
Less payment crackers and cereals on SS Oscar II			8,050.44	
Net Amount Due			$380,761.54	

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Claimants have not been reimbursed and have not received any compensation through insurance or otherwise for the above cargoes except as above noted and there are no set-offs or counterclaims.

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ANNEX B.

9. Claimants represent and allege that claimant, John S. Sorenson, now and since February 24, 1887, has been a citizen of the United States of America and that claimant, Thorleif S. B. Nielsen, now and since October 5, 1886, has been a citizen of the United States of America
456 and said claimants are entitled to the payment of said debt under the provisions of Section 9 of the "Trading with the Enemy Act"; that no person or persons whatsoever, except as above stated, have any interest in or lien upon the proceeds of the claim set forth in the within notice; that this notice is not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the "Trading with the Enemy Act"; that the claim herein referred to is in all respects bona fide and that there are no set-offs, counterclaims or defenses, except as herein stated.

Exhibit Q Annexed to Affidavit of Frank C. Sterck 457

Affidavit of Individual Making Claim.

State of .....
County of ..... ss:

I swear (or affirm) that the foregoing statements are true and correct.

.....

Subscribed and sworn to before me this.....day of ....., 192.....

..... 458
.....

Affidavit of Member or Representative of Partnership Making Claim.

State of New York,
County of New York, ss:

We swear that we are the surviving partners of the partnership making foregoing claim, and that the foregoing statements are true and correct. 459

JOHN S. SORENSON
THORLEIF S. B. NIELSEN

Severally Subscribed and sworn to before me this
11th day of November, 1927.
George O. Castell
George O. Castell
Notary Public.
New York County No. 78.
New York Register's No. 8115.
Commission Expires March 30, 1928.

460 *Exhibit Q Annexed to Affidavit of Frank C. Sterck*

Affidavit of Officer or Representative of Corporation or Association Making Claim.

State of .....
County of ..... ss:

I swear (or affirm) that I am the ..... of the corporation/association making the foregoing claim, and that the foregoing statements are true and correct.

.....

461 Subscribed and sworn to before me this.....day of ....., 192....

.....
.....

A. P. C.
Claim Section
Received
Nov. 12, 1927
Referred to .....
Answered .....
Date .....
No. .....

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Exhibit R Annexed to Affidavit of Frank C. Sterck. 463

Letter dated November 12, 1927, from R. S. Doyle of the firm of Hopkins, Starr, Hopkins & Hamel, Washington, D. C., to the Alien Property Custodian, transmitting Claim No. 38566.

HOPKINS, STARR, HOPKINS & HAMEL

LAWYERS

Southern Building

WASHINGTON, D. C.

Telephone Franklin 630 464

Hopkins, Starr & Hopkins
110 So. Dearborn Street
Chicago

Albert L. Hopkins
Merritt Starr
John Lamar Hopkins
Frederick Dickinson
Harry B. Sutter
Jay C. Halls
Donald J. De Wolfe
George K. Bowden
Edward H. Mc Dermott
Samuel G. Clauson
John Enrietto
O. John Rogge
Peter Leland Wentz

Charles D. Hamel
Richard S. Doyle
Lee I. Park
Benjamin H. Saunders

Cl 38566
Alien Property Custodian 465
Received Nov. 12, 1927
Noted ..... Date .....
Ans'd M. O. D.
Date 11/25/27

November 12, 1927.

Honorable Howard Sutherland,
Alien Property Custodian,
Washington, D. C.

Sir:

We are transmitting herewith in duplicate notice of claim of John S. Sorenson and Thorleif S. B. Nielsen as

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surviving partners of the firm of Crossman & Sielcken, New York, N. Y., against the cash and other assets now in your possession seized as the property of the Zentral-Einkaufsgessellschaft, m. b. H.

Will you kindly send us a formal notice acknowledging the receipt and filing of this notice and claim.

Respectfully,

RSD:G R. S. DOYLE

A. P. C.

467 Claim Section
Received Nov 12, 1927
Referred to .....
Answered .....
Date .....
No. .....

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Exhibit S Annexed to Affidavit of Frank C. Sterck. 469

Letter dated November 21, 1929 to W. H. Pettry, Claims Division, Alien Property Custodian's Office, from Hamel & Doyle, stating that Mr. Hamel and Mr. Doyle are associated with Messrs. Barnes, Avery & Whiting in the prosecution of Claims 38566 and 38530.

LAW OFFICES OF
HAMEL & DOYLE
Southern Building
Fifteenth and H Streets 470
WASHINGTON, D. C.
Telephone Metropolitan 4351

Charles D. Hamel
Richard S. Doyle
Lee I. Park
Benjamin H. Saunders
John Enrietto

Cl 38566

Lloyd Anderson

November 21, 1929. 471

Re: Claim Nos. 38566 and 38530

Mr. W. H. Pettry,
Claims Division,
Alien Property Custodian's Office,
Washington, D. C.

Dear Sir:

We beg to acknowledge receipt of your letter of the 15th and to advise you that Mr. Hamel and Mr. Doyle of this firm are associated with Messrs. Barnes, Avery & Whiting in the prosecution of both of these claims.

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This case will be reached for trial in the Southern District of New York, the first week December. These two claims cover the same subject matter, and we would prefer to delay taking any action on either claim until after decision of the court.

Very truly yours,

HAMEL & DOYLE.

RSD:G

A. P. C
Claim Section
Received Nov. 22, 1929
Referred to .....
Answered .....
Date .....
No. .....

Alien Property Custodian
Received Nov. 22, 1929
Noted W. H. P. Date 12/17/29
Ans'd ..... Date ———

473 Taken care of by letter W E. O.

474

Exhibit T Annexed to Affidavit of Frank C. Sterck. 475

Testimony of Brainard S. Avery taken in January of 1935 before Referee Seligsberg.

SURROGATE'S COURT,

NEW YORK COUNTY.

IN THE MATTER

of

The Estate of Hermann Sielcken, Deceased. 476

Before: Walter N. Seligsberg, Esq., Referee.

Vol. 4, pp. 1191-1649

1572

MATTER OF HERMANN SIELCKEN, continued.

477

43 Exchange Place,
New York, N. Y.,
January 11, 1935;
10:30 A. M.

Before: Walter N. Seligsberg, Esq., Referee.

Present:

Howard Hasbrouck, Esq.,
Brainard Avery, Esq.,
Albert Avery, Esq.,
Selden Bacon, Esq.,
David S. Hecht, Esq.,
Robert H. Wrubel, Esq.

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P. 1603 BRAINARD AVERY, called as a witness on behalf of the petitioner, being first duly sworn by the Referee, testified as follows:

Direct Examination by Mr. Hasbrouck:

Q. Mr. Avery, where do you reside? A. 44 West 44th Street, New York City.

Q. What is your occupation or profession? A. Lawyer.

P. 1604 479 Q. Do you recall when you were admitted to the bar? A. 1895.

Q. You are a lawyer and have been a lawyer practicing in the State of New York? A. Yes.

Q. Are you a member of any firm now? If so, what? A. Avery & Whiting, 100 Broadway.

Q. Were you a member of any firm in 1927? A. Yes, Barnes, Avery & Whiting.

Q. When, for the first time, was the Estate of Hermann Sielcken or its affairs called to your attention? A. 1927.

Q. Where, and by whom? A. By Mr. Alex Sielcken, in my office.

480

• • • • • •

Q. You had a conversation with Mr. Alex Sielcken? A. Yes.

Q. When? A. For the first time, when the estate was mentioned, early in 1927.

Q. Can you be more specific in that; can you give us the month? A. February.

Q. Had you prior to that time had anything
P. 1605 whatever to do with the estate of Hermann Sielcken? A. No.

Q. Did you know anything about its affairs? A. No.

Q. Can you tell us how long this conversation lasted? A. My recollection is, Mr. Sielcken referred to the loss of some meat cargoes.

• • • • • •

P. 1608 By Mr. Hasbrouck:

Q. After this first conversation with Mr.
P. 1609 Sielcken, did he bring you any paper? A. Yes.

Q. What were they? A. I can identify now a copy of the newspaper report of the Prize Court decision in London with some letters.

* * * * * *

P. 1609 Q. What did you do after the receipt of those papers, in so far as your actions pertained to the estate of Hermann Sielcken? A. I visited
P. 1610 the Department of State in Washington. 482

Q. Do you recall when you went there? A. Around the 1st of March, 1927.

Q. Whom did you see? A. I saw the man in charge of claims presented by the United States against Great Britain, and also called at the office of the American Agent in the Mixed Claims Commission, United States and Germany.

* * * * * *

P. 1612 Q. Do you recall the time of your second visit? 483
A. Yes.

Q. When was that? A. March, 1927.

Q. Can you be more precise in the date? A. No; I was visiting Washington weekly then
P. 1613 and called at the Mixed Claims Commission about other matters and brought up the subject of the Copenhagen cargoes again, and returned to New York and had an interview with Mr. Sielcken.

Q. Did you have any interviews with anyone else at about this time? A. Yes, I went to Boston.

Q. Whom did you see over there? A. Frank H. Stewart.

Q. Who is Mr. Frank H. Stewart? A. A lawyer of the firm of Stewart & Chase.

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Q. What was your purpose in going over there? A. To talk with him about the claim presented against Great Britain by the United States on account of what was called the shipments of fat backs, later known as Copenhagen cargoes. Mr. Stewart produced his files, and I spent a day in his office examining the papers.

Q. About what did those files relate? A. To the claim presented by the United States to
485 the British Government.

The Referee: That is, the claim on behalf of the executor?

The Witness: Yes.

P. 1613 The Referee: In which Mr. Stewart represented the executor?

The Witness: Yes.

Q. Did you have any conferences with Mr. Sorenson at about this time? A. To the best
P. 1614 of my recollection, my meeting with Mr. Sorenson was in April, and after my second visit to Boston to see Mr. Stewart.

486 Q. Were any papers relating to the Sielcken estate given to you by Mr. Sorenson? A. Not at that time, as I recall; later, yes. I would like to add, before I went to Boston I made two visits to the Department of Justice in Washington and received two visits from officials of the Department at my office in New York.

* * * * * *

P.1618 Q. At about this time did you have any conversations with Mr. Judd?

* * * * * *

A. Yes.

Q. Can you tell us when they were? A. They began in April, after my return from Boston.

Q. Can you tell us approximately how many conversations you had with him prior to the time when your firm was retained by Mrs. Sielcken on May 10, 1927? A. Not to exceed three or four.

Q. Where did they take place? A. At the office of the Columbia Trust Company, 60 Broadway.

Q. Was it in 65 Broadway? A. 60 Broad- 488
way.

Q. Tell us what those conversations were, in substance. A. Mr. Sielcken took me to Mr.
P. 1619 Judd and introduced me. I participated in telling Mr. Judd what inquiries had been made at the first interview. He was to see what files were available upon the subject of
P. 1619 the Copenhagen cargoes. I later saw Mr. Judd and he introduced me to Mr. Major. They had some papers together, which were added to. I went again with Mr. Castell of my office and examined all the papers they thought were relevant. I can think of nothing Mr. Judd said, 489
except to get the files together. He listened attentively, and I can recall no questions that were asked Mr. Judd by me.

Q. What office, if any, did Mr. Judd hold in the Trust Company? A. At that time he was trust officer, and, I think, Vice-President.

Q. What office, if any, did Mr. Major hold in the Trust Company? A. Mr. Judd's assistant.

Q. At this time did you tell either one, or both of these gentlemen, the substance of the conversations which you had had previously with the gentlemen to whom you spoke in Washington, and also with Mr. Sorenson and Mr. Nielsen? A. The substance was told Mr. Judd

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but I think I did not go into detail, there were so many uncertainties and apparent inconsistencies of fact between the records in Washington and the records in Boston. I recall my first call to Mr. Judd was that it was a theory that

P. 1620 Mrs. Sielcken wanted investigated. Mr. Judd concurred in assisting in the investigation.

Q. A theory relating to what, Mr. Avery? A. Relating to the real buyer or owner of the seized Copenhagen cargoes.

491 Q. Do you recall whether anything was said at that time about the Wille account? A. That is too early.

Q. Nothing was said then? A. No.

Q. Do you recall whether, during this preliminary period, you had any conversations with Mr. Warren? A. Yes.

P. 1620 Q. Where did they take place? A. At the office of the Chase National Bank, directly across the street from Mr. Judd's office—directly across Broadway from Mr. Judd's office.

Q. Mr. Warren was then an officer of the Chase Bank, was he not? A. Vice-President.

492 Q. Had he previously been an officer of the Irving Trust Company? A. He said he had been.

. . . . . .

P. 1621 Q. Do you recall, Mr. Avery, anything else which you did in connection with the affairs of the Sielcken estate prior to the time when your firm was formally retained on May 10, 1927, by Mrs. Sielcken? A. Mr. Judd sent me to Mr. Warren. He made the appointment on the telephone and waved across Broadway from Mr. Judd's window to Mr. Warren's

window. I had conversations with Mr. Warren, who said he had been in charge generally of the estate—

. . . . . .

P. 1622 Q. Mr. Avery, what did Mr. Judd say to you with respect to your going to interview Mr. Warren? A. Mr. Judd stated that during the active part of the administration of the Sielcken estate Mr. Warren had general charge; 494 that he, Mr. Judd, knew about the estate but did not know the details; that Mr. Judd was unable to give me information which I was seeking; that he felt sure that Mr. Warren would have many more facts than Mr. Judd had, and if I would call at Mr. Warren's office immediately he would call him on the telephone and arrange for me to go over. He did so and I called on Mr. Warren.

Q. Now, can you fix the time and place of your first conversation with Mr. Warren? A. About the middle of April, 1927.

P. 1622 Q. Where? A. At Mr. Warren's office in the 495 Chase Bank.

Q. Please tell us the conversation that then took place.

. . . . . .

P. 1623 A. I told Mr. Warren that I had found that the Reichs Einkaufs-Gesellschaft and Z.E.G. were identical; that I believed the purchaser of the seized cargoes was the Central Purchasing Agency.

Mr. Bacon: The Z. E. G.?

The Witness: Yes, Z. E. G.

A. (continued) But there was an inconsistency about the claims in the State Department.

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I told him that the claims had been presented by the American Government against Great Britain for the entire cargoes, whereas Mr. Sorenson had told me, and Mr. Sielcken had told me, from the books of Crossman & Sielcken in New York—

• • • • • •

A. (continued) And Alex Sielcken, had shown
497 me that one-half of these cargoes was in the joint account and owned by Wille of Hamburg, a British enemy. I asked Mr. Warren if he could explain the discrepancy between the
P. 1624 ownership being alleged by the American Government as entirely in Crossman & Sielcken, whereas the books showed that one-half of the cargoes were owned by a German enemy. I told Mr. Warren that theoretically, if Great Britain paid for the cargoes, that one-half of that recovery must, on the face of things, be remitted to Wille, a German enemy; that I had been informed in Washington that theoreti-
498 cally it was an international crime. He said he was surprised; that what had been done in Boston had been done on the recommendation of one of the former employees of Crossman & Sielcken; that he knew nothing about that phase of it except—

Mr. Bacon: You mean you told Warren this:

The Witness: Warren told me that he knew nothing about this phase of the claim, except that such a claim was being made; that he had inquired as to the standing and reputation of the Boston lawyers and found they were of the highest. I recall no definite facts given me from Mr. Warren that were anything except promises of assistance, and an invitation to report to him how I was getting along, and should ask him for any information.

Q. Do you recall whether you had any other conversations with Mr. Warren prior to the
P. 1625 time when your firm was retained by Mrs. Sielcken? A. I saw Mr. Warren more than once. I inquired about the official standing of Mr. Sorenson and Mr. Nielsen, about the liquidation, who were the parties in interest. Mr. Judd furnished me with copies of the partnership agreement. I discussed it with Mr. Warren. My discussions with Mr. Warren and Mr. Judd, who were physically so close together—100 feet 500
apart—related in the first instance as to the identity, the legal status of the claimant, if there was a claim.

Q. Would it be correct, Mr. Avery, for me to say that your activities with relation to the Sielcken estate during this preliminary period, prior to the retainer of your firm, were those of investigation and conference to ascertain what you could do primarily with reference to the seized cargoes? A. Yes; for Mrs. Sielcken, not for the executor.

Q. Your firm was formally retained on May 10, 1927, was it not? A. Yes. 501

* * * * * *

Q. By Mrs. Sielcken? A. Yes.

Q. Will you please tell us what you or your firm did first after you received your retainer? A. Just prior to the retainer being arranged, I called on Mr. Judd and told him that Mrs.
P. 1626 Sielcken had no status before the Mixed Claims Commission; that the information and the assistance being given me at the Commission was personal, and that I should have the authority of the executor to make inquiry on its behalf. Mr. Judd asked me if I wanted a formal letter authorizing me, and I told him that the matter

had not proceeded to that point, except I wanted him to know that I would make my inquiries and do my work from that point on on behalf of the executor.

He inquired about the charge for the services, and I told him that that had been arranged by Mrs. Sielcken, and that she or Alex Sielcken would take it up with him. Mr. Judd said that it was agreeable to him.

Also, before the retainer Alex Sielcken had
503 brought or had caused to be brought from various sources documents and papers. Mr. Stewart's files had been forwarded from Boston to the Irving executor, and had been sent intact, I think, without the package being opened, by Mr. Judd to me. Numerous papers and documents were coming from, I think they told me, Mr. Sorenson or from Crossman & Sielcken's files. The executor's files were almost bare on this subject. They nearly all came from Boston.

Mr. Sielcken showed me some papers that he said he had gotten from Mr. Smith. By the
504 time of the retainer I was able to advise Mrs.
P. 1627 Sielcken that claims could be made by the Sielcken estate against Germany on three items. The first item was the Copenhagen cargoes; the second item was the claim of Crossman & Sielcken, a citizen of the United States, against Theodor Wille, a citizen of Germany; and the third claim was what was called the Mark depreciation claim, where the loss must be sustained by an American citizen through what was called the German Exceptional War Legislation. This situation was laid before Mrs. Sielcken and Mr. Alex Sielcken, discussed with Mr. Judd and Mr. Warren; also with Mr. Sorenson and Mr. Nielsen, and the retainer was arranged early in May, 1927.

I inquired if anyone had examined the files of Mr. Hermann Sielcken in Baden-Baden.

Mr. Bacon: Whom did you ask that?

The Witness: Mrs. Sielcken, Mr. Alex Sielcken, Mr. Stewart, and, I believe I asked that question of Mr. Neilsen. Mr. Nielsen told me he had been in Germany following the seizures.

. . . . . .

P. 1628 A. (continued) Mrs. Sielcken informed me 506
that no one had opened the files of Mr. Sielcken since his death, October 8, 1917. I explained to Mrs. Sielcken and to Alex and to Mr. Judd that it was important, in my opinion, to examine these papers to find either corroborating evidence or information which would assist us in the claims. I arranged with Mrs. Sielcken to send Mr. Castell, who works in the German language, immediately to Hamburg and Baden.

Q. Who is Mr. Castell? A. At that time he was a junior partner in Barnes, Avery & Whiting. 507

Q. Did Mr. Castell go to Germany? A. He went to Germany later, in May, 1927.

Q. The latter part of May? A. Yes.

Q. How long did he remain over there? A. Until the end of September, 1927.

Q. Will you proceed with the recital of what you did after the retainer was made? A. I spent much time in endeavoring to connect Levin and Beckmann and Jorgensen of Copenhagen as agents of the Z. E. G. in the C. & S. shipments. I had made inquiry in Washington and had found $880,000 on deposit in the United States Treasury belonging to Z. E. G. If Z. E. G. was the buyer of these Crossman & Sielcken cargoes, I advised Mrs. Sielcken and

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Mr. Judd that we might get that money. Mrs.
P. 1629 Sielcken and Alex sailed in May, 1927. Mr. Castell was in Baden-Baden and Hamburg, and I went to Germany in August.

Q. 1927? A. 1927; working with Mr. Castell.

Q. Mr. Avery, let me interrupt your trend of thought just a moment, if I may. During the period from the execution of the retainer until you sailed in August of 1927, and while you
509 were in this country, were you engaged generally in investigating the facts relative to these claims that you have mentioned? A. Yes, sir.

Q. Now, you sailed in August, did you? A. Yes.

Q. And where did you go? A. Hamburg and Berlin.

Q. Will you please pick up your narrative from the time of your arrival in Germany, and tell us what you did from then on? A. On arrival at the Hotel Atlantic in Hamburg, I found Mr. Castell with his room literally, almost full of papers, with a stenographer and
510 translator. He was engaged in sorting out papers he thought might be relevant, and the papers which he selected, as I had not worked in German, I made a selection from and brought them to New York with me. Mr. Sielcken was there helping.

Q. Mr. Avery, may I interrupt the thread of your narrative and take you back prior to the time when the retainer was entered into? Did
P. 1630 you have a conversation with Mr. Judd and, if so, when and where, at which you told him the substance of a conversation you had previously had with a Mr. Osann? A. Yes.

Q. Where did that conversation take place, and when? A. In my office.

Q. Can you fix the date? A. Between the 1st and 7th of April, 1927.

Q. What was said at that time? A. I called Mr. Judd's attention to the decision of the Prize Court, which was in printed form, which referred to the Reichs Einkaufs-Gesellschaft, to Crossman & Sielcken, to the jewelers, Beckmann & Jorgensen, who suddenly became one of the largest food concerns in the world in 1914, to Harry Levin, who was an auditor in Hamburg, who blossomed into a merchant on a large scale in Copenhagen; that I had applied to the Department of State about information 512
concerning the Reichs Einkauf and had been informed that that had been a temporary agency, and it was believed had been succeeded by the Central Purchasing Agency, Z. E. G.; that I had pursued my inquiries at the Department of Justice and had been informed by Captain Offley that my inquiries would have immediate attention, but that he would send me, in the course of a day or two, Colonel H. E. Osann. This was all told to Mr. Judd, which he said was a very interesting story. Colonel Osann had been placed in charge by the American Government of enemy activities and un- 513
P. 1631 neutral activities. He would give me the information, if available in the United States, and, if not, he would try and get it from Germany. Osann had gone to Germany.

* * * * * *

A. (continued) That he enlisted in the German army, had become a Colonel attached to the General Headquarters at Aix; as Mr. Osann he sent his dispatches from the working desk of the Kaiser, his wife and family receiving checks from the American Government.

Mr. Bacon: You mean he was in the German army?

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The Witness: He was in the German army, Oberhauptmann in the German army.

P. 1631 A. (continued) Osann came from Omaha to see me perhaps, among others; he was here a day or two. Captain Offley admitted the matter was of great importance. Osann said he would have to return to Washington to get his files, as they related entirely to Von Papen's activities in the United States beginning in the fall of 1914. He did so, and two days later came to
515 my office and gave me the working chart of the Reichs Einkauf—Zentral Einkaufs-Gesellschaft, and the substance of information which
P. 1632 was later checked, and not substantially changed, with the exception of the operation of the Danish Food Control, which came out later in the year.

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A. (continued) Mr. Judd had expressed his doubts. He said he doubted the wisdom of Mrs. Sielcken making any investigation and spending
516 any money; that the executor had no money, and that, while the executor wished to cooperate in every way, he must make it clear there will be no liability. He said that they would cooperate in every way to let us have the information available. This was a conversation which was arranged early between Mr. Judd and my firm, Barnes, Avery & Whiting, to accept the retainer from Mrs. Sielcken to represent the claims of the estate on account of the seized cargoes.

Q. Now, Mr. Avery, will you pass from that interpolation to the point where you were in Germany in the late summer or early autum of 1927 with Mr. Castell, and proceed with your narrative?

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P. 1633 A. After the discovery of the $800,000-odd of Z. E. G. money in Washington, I devoted my attention largely to the Wille account, which at that time divided itself into four items: First the Prado account; second, the open account of Wille; the third item, and a very important one, we call the million-dollar cable transfer of 1916; and the fourth item of the claim, as then divided, was the Mark depreciation because of Crossman & Sielcken's heavy Mark balance in Germany which Mr. Sielcken, because of war, 518
his illness and death, was unable to remove within the six-months' period which American citizens had to remove their property from Germany following the declaration of war, and which expired October 6, 1917, two days before Mr. Sielcken died. That treaty was not with Germany; it was with the Kingdom of Prussia.

Mr. Bacon: It was adopted by the German Reich after 1871. I think the Court takes judicial notice of that.

A. (continued) The work in Germany was largely devoted to the Wille account, as the 519
Copenhagen cargoes had been pretty well cared
P. 1634 for before I left New York. Mr. Castell and myself returned to New York at the end of September, 1927, and I then had several conferences with Mr. Judd as to the progress that had been made. Mr. Sorenson was on the job daily. I saw Mr. Warren from time to time. It would be difficult to repeat the various conversations as they followed the matter very closely as it developed.

Q. Did you, upon your return, or did the members of your firm, start the preparation of memorials? A. Yes.

Q. When were they prepared and filed, do you recall? A. The memorials were skeletonized

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before I went to Germany in August. I asked Mr. Sorenson to assist in getting the proofs ready, as the American Agent said that these claims could now be revived, as he called it, and, as no proofs had previously been filed, he would prefer to examine the proofs in advance of the filing of the memorials.

Mr. Bacon: Who was this, Mr. Bonynge or Mr. Martin?

The Witness: Both, but particularly Mr. Martin. At the end of October, 1927, the proofs were fairly in order. There was much accounting work to be done, many files and books to be examined, and any evidence that might exist that would protect the claims.

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Q. Can you tell us approximately how long your firm was engaged in the preparation of these papers in support of the claims?

P. 1635

Mr. Bacon: You mean these preliminary proofs?

A. Except Mr. Castell, I think no one in our office was engaged, but I became so much interested in it that I worked steadily all the time until the memorials had been filed with the proofs and the suit had been started against the Alien Property Custodian.

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P. 1636

The Witness: Mr. Castell and myself were exclusively engaged from April until December, 1927, in the preparation of the proofs, the memorials and the Federal suit. The remainder of the office was not much involved.

Q. Do you recall, Mr. Avery, when the memorials were filed in Washington? A. November, 1927.

Q. Late November, was it not? A. Late November, 1927.

Q. Do you recall whether the proofs in support of the claims of which you have spoken were filed at the same time? A. They were filed at the same time, but were in the possession of the American Agent some days before the filing and were examined by him.

P. 1637

Mr. Bacon: Who is the American Agent; to whom do you refer?

The Witness: Mr. Bonynge, but particularly Mr. Martin. They had assistants down there. 524

Mr. Bacon: I suppose we can stipulate that Mr. Martin was counsel for Mr. Bonynge, the American Agent.

Mr. Hasbrouck: I understand that is the fact.

The Witness: Yes.

Mr. Bacon: H. H. Martin?

Mr. Hasbrouck: Yes; H. H. Martin.

Q. Was a suit commenced also in December, 1927, in the United States District Court against the Alien Property Custodian, the United States Treasurer and Z. E. G.? A. Yes. 525

Mr. Bacon: By whom, and when were the summons and complaint in that action prepared?

The Witness: Mr. Barnes and myself were the solicitors of record, and the suit was started in the United States Federal Court, Eastern District, and discontinued and again started in the Southern District.

Q. While you were engaged in the preparation of these papers in support of the memorials, were you also engaged in gathering together data for this suit, and in preparing the summons and complaint? A. Yes.

P. 1638

Q. Now, Mr. Avery, you have the memorials on file and the suit commenced in the Federal

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Court. Will you tell us what you did next? A. I went to Washington.

Q. Can you tell us when you went? A. January, 1928.

Q. Whom did you see and what did you do? A. I was called to Washington to have a meeting with the German Agent, Dr. Von Lewinski.

Q. What transpired at that time at your meeting with him? A. Dr. Von Lewinski expressed his dissatisfaction at the allegations of fraud in connection with the million-dollar cable transfer of 1916, and stated that he wanted to discuss the situation, as it was very clear to his mind that there was no basis whatever for my statements. We had that discussion. I told him then that the charge would be withdrawn, or, at least, that the executor would consider the withdrawing of the charge if he would produce proofs that the German War Bonds had been bought in Germany, which he promised to get.

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Q. By "German War Bonds," you mean war bonds which were to be purchased with this cable remittance of $1,000,000? A. Yes.

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Q. Will you proceed, please? A. That is what

P. 1639

I did next. The next after that, I think I was in communication with Mr. Martin, having other cases in Washington, and may have called at the Commission, and probably did. Mr. Martin stated that the German Government would like to have me go to Berlin.

Q. At that time had a motion been made to dismiss the memorials? A. Yes.

Q. Will you please tell us about that? A. The motion had been made to dismiss the memorials on the ground of lack of jurisdiction of the Mixed Claims Commission, and we were asked to assist in resisting the motion.

Q. What did you do in the way of resisting the motion; were briefs prepared? A. There

were several conferences, and Mr. Whiting and Judge Hamel's office in Washington, who assisted me down there in the matter, prepared briefs.

Q. Those briefs were submitted, were they? A. They were submitted in due course; the date, I do not know.

Q. Do you know how many briefs were prepared? A. Two.

Q. You cannot tell us exactly when they were submitted? A. I cannot give you the exact date 530
offhand.

Q. What did you do after having this talk with Dr. Von Lewinski to which you have referred? A. There was constant office work with my own people. Mr. Sorenson was the most
P. 1640 active man outside of the office in hunting for material, or to find the material that did not exist, particularly in getting information about this million-dollar cable transfer, which was the first rock that somebody's boat hit, and then there was a conference with Mr. Bonynge and he stated it was the first time an attorney for an American claimant had been invited to go 531
to Berlin in connection with a claim. He said he thought I ought to go.

Q. Had Dr. Von Lewinski asked you to meet him in Berlin? A. No; he or some of his staff had conveyed that information to the American Agent.

Q. Now, have you told us all that occurs to you which you did prior to your sailing for Europe in the spring of 1928? A. Well, it was the substance, looking over the books and papers relating to the cargoes and the Wille account of Crossman & Sielcken, and limited only to that.

"Q. Did you act on the suggestion transmitted to you by Dr. Von Lewinski, and, if so,

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what did you do and where did you go? A. I am not sure the invitation came from Dr. Von Lewinski; I believe it was cabled from Berlin. I accompanied Mrs. Sielcken to Germany, leaving the end of February, 1928. She went to her place in Holstein, and I went on to Berlin.

Mr. Bacon: When did you say that was?

P. 1641 The Witness: February, 1928.

Q. Might it not have been early in March, 1928? A. I arrived in Germany early in March,

533 1928.

Q. What did you do upon your arrival and while you were there? A. I conferred with Frederick Wirth, an American lawyer residing in Berlin. We prepared for the meetings at the Foreign Office, which began a few days after my arrival, and continued substantially three days a week for almost two months.

Q. Who was Mr. Wirth? A. An American lawyer, formerly from New York.

Q. And he had been an assistant to Mr. Bacon; is that correct?

534 Mr. Bacon: He had been a clerk in the office of Sackett, Bacon & McQuaid.

Q. Will you proceed with your narrative?

* * * * * *

A. (continued) The meetings began at the Foreign Office, in both German and English, very slow, and continued until results began to be realized at the end of April.

P. 1642 Mr. Bacon: Which year is this?

The Witness: 1928.

Q. Do you recall when you left Berlin? A. Yes, I left Berlin April 30, 1928.

Q. Where did you go? A. Paris.

Q. How long were you in Paris, do you remember? A. Three weeks.

Q. Where did you go then? A. New York.

Q. When did you arrive here? A. The end of May, 1928.

Q. Was anything said while you were carrying on these negotiations in Germany as to the possibility of adjusting these matters until there had been a determination in the United States District Court of the question who had as- 536
sumed the risk of seizure at sea of the cargoes in question? A. Yes.

Q. What was said and done about that? A. The German delegation—Dr. Hugo Israel and Dr. Von Lewinski were spokesmen—stating that if an agreement for adjustment could be reached, could it not be made effective at once. They stated that they were willing that a default judgment should be entered against Z. E. G. in the New York suit; that they had ascertained by cable that such default judgment would be binding upon the A. P. C. in the con-
P. 1643 dition in which the litigation was. The question 537
then arose whether it would be lawful or proper to make such an arrangement in Germany on money in possession of the United States, although it was a stakeholder, under the Treaty of Berlin of 1921, of this money, unless the consent of the United States, with knowledge about all the facts, were obtained in advance.

The situation had been complicated by the fact that Congress had, in the spring of 1927, adopted a law, or passed a law or an amendment devoting this $800,000 to the American holders of German bonds payable in dollars. One of the questions in issue at our Berlin meetings was how the settlement could be put

through if it were reached. The Germans insisted upon dropping off from the claims the settlements which they claimed Mrs. Sielcken was bound to, which had been made in Germany. That involved substantially a half-million dollars. They took a short-cut through the estate, through the residuary legatee, Mrs. Sielcken, assuming that the executor would follow her directions in that respect.

Another one of the most mooted questions

539 was—

Mr. Bacon: I ask to have that made a little more clear, Mr. Avery. You said they took a short-cut. You mean they did it this time or they did it some other time?

The Witness: For the purpose of this dis-

P. 1644 cussion, shall I say, expected to represent and bind Mrs. Sielcken? As I made no agreement in Germany on behalf of the estate, I had no power of authority or letter of attorney from the executor, but as she was the residuary legatee it was expected the formalities would be completed to effectuate the settlement in

540 New York. That was stated. There was a question as to whether or not the authority of the executor should not be sought by cable. It was then stated by me that the situation was so complicated that I preferred not to even ask for it.

The other mooted question was: At whose risk these goods were afloat at the time of the Declaration of London was violated and they were seized.

. . . . . .

Q. Do you wish, Mr. Avery, in the answers which you have just given, to change any of the phraseology, now that the last answer has been read to you? A. I inadvertently used the

word "settlements" made by Mrs. Sielcken or by the German executors. I think a more accurate word would be "adjustment."

Q. Now, will you tell us again when you arrived in New York? A. Just before May 30, 1928.

Q. What did you do or what did any member
P. 1645 of your firm do after your return here? A. Very shortly after, I became very ill, and, except for routine matters, these matters were held in abeyance until I resumed in September, 542
1928.

* * * * * *

Q. Now, when were the German answers filed to the memorials, if you recall? A. The autumn or early winter—later that year, I think.

Q. What did you do, as far as you remember, or what did your firm do after your return and your recovery from your illness, until the end of that year, 1928? Perhaps I can refresh your recollection. Were briefs in support of the claims prepared? A. Yes; there was a main 543
brief and supplemental brief, which were not prepared by me, although I worked on them. We were also endeavoring to perfect our proofs.

Q. One of those briefs was filed towards the end of 1928, was it not? A. I believe so.

Q. And the other early in 1929? A. Yes.

Q. Now, what did you do beginning with 1929? A. Matters were followed up by me in Washington with the American Agent. I had reported to him the tentative agreement of settlement made with the Germans. I was reminded that the political condition in Germany
P. 1646 might change and there would be a new administration there, and the agreement for settlement might not be carried out, assuming we

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succeeded in the litigation with regard to the cargoes. Mr. Martin, in Washington, suggested that I make the effort to get a direct statement from Copenhagen as to the agency, particularly of Harry Levin, and otherwise perfect the proof.

Q. You mentioned just now a tentative agreement. Are you referring to the arrangement which you made when you were in Europe in the spring of 1928? A. Yes.

545 Q. Now, did you go to Europe again in the spring of 1929? A. Yes.

Q. When did you leave? A. June, 1929.

Q. Where did you go upon your arrival? A. On this matter I went from Stockholm to Copenhagen, to Hamburg and Berlin.

Q. What did you do while you were there? A. I made an effort in Copenhagen to locate Mrs. Harry Levin. I called on Beckmann & Jorgensen. Mrs. Levin had disappeared into Germany. I did not have the password from Germany loosening up Beckmann & Jorgensen. I went on to Hamburg and then again to Ber-

546 lin on the same matter. I had further discussions in Berlin.

Q. When did you leave to return to America, if you recall? A. I arrived in New York the end of August, 1929.

P. 1647 Q. Had the case in the United States District Court been reached for trial yet? A. No.

Q. But it was on the calendar, was it not? A. Yes.

Q. What did you do after your return, to which you have just referred? A. I went to Washington, to the Department of Justice.

Q. What did you do there? A. I endeavored to arrange to have the Attorney-General concur in a default judgment against Z. E. G., which would result in the A. P. C. and the

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Treasurer of the United States paying over the entire Z. E. G. item, Unknown Enemy No. 1, to us.

Mr. Bacon: That Unknown Enemy No. 1 was Z. E. G., was it not?

The Witness: Z. E. G. was reported to Congress for years; the item had been Unknown Enemy No. 1. The identity of that Z. E. G. had been established sometime prior.

Q. And the balance credited to Unknown Enemy No. 1 had been attached in the suit in 548
the District Court, had it not? A. It had been decided that the notice served under the Trading with the Enemy Act was the equivalent either to a formal attachment, assuming we could have gotten any officer to attach it, or a mandamus, which was considered, against the Treasurer of the United States to segregate the money.

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P. 1648 A. (continued) I can illustrate that a little bit. The executor served notice upon the A. P. 549
C. and the Treasurer that it claimed the Z. E. G. moneys in possession of the A. P. C., but the A. P. C. answer—the response of the A. P. C. was, "This money is not in my possession because it has been already appropriated by Congress."

There was then a close study given to the question of a mandamus proceeding directed against the A. P. C. and the Treasurer of the United States to segregate this money pending the decision of existing litigation, and anything else, and prevent its being paid over to the holders of the German bonds in America payable in dollars. I was told in Washington, at

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the Department of Justice, that I could not find a Deputy Marshal in the District that would attach the money.

Q. Have you told us all you did in Washington, as far as you recall, at that time? A. Only a part of what had been done, and I am trying to sketch it.

Q. I do not want details, Mr. Avery. A. I went to the Department of Justice on several occasions and had long discussions with the As-

551 P. 1649 sistant Attorney General, Rhoads, in an effort to have him acquiesce in permitting judgment to go against Z. E. G. and letting the settlement go through. An opinion was written by the Attorney General upon the subject that as the United States was only a stakeholder in this, that it must be done by judicial determination. The Department assisted us in bringing the matter on before Judge Knox, with the concurrence of Z. E. G., so that the trial actually occurred before Judge Caffey in December, 1929.

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(Whereupon, at 4:40 P. M., an adjournment was taken to Tuesday, January 15, 1935, at 10:30 A. M.)

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P. 1650 Matter of Hermann Sielcken, continued.

43 Exchange Place,
New York, N. Y.,
January 15, 1935;
10:30 A. M.

Before:

Walter N. Seligsberg, Esq., Referee.

Present: 554

Howard Hasbrouck, Esq.,
Brainard Avery, Esq.,
Albert Avery, Esq.,
Selden Bacon, Esq.,
David S. Hecht, Esq.,
Robert W. Wrubel, Esq.

BRAINARD AVERY resumed.

Direct Examination (continued) by Mr. Hasbrouck:

Q. Mr. Avery, at the last hearing you testified that you had had a conversation or conversations with officials of the State Department in Washington. Subsequent to the time when you had those conversations, did you speak to anyone or any officer of the Trust Company with reference to them? A. Yes, Mr. Judd. 555

Q. Do you recall when and where it was? A. In the spring of 1927 there were several conversations between me and Mr. Judd, gen-
P. 1651 erally at his desk at the Irving Trust, 60 Broadway. On occasion he stopped at my office to inquire if there was anything new.

Q. Will you tell us, please, what you said to Mr. Judd with reference to the conversations which you had in Washington, and to which I have referred?

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Mr. Bacon: Can you fix the date of this a little more accurately?

Mr. Hasbrouck: I will put this question, then.

Q. Can you tell us approximately when you had your conversation with Mr. Judd, at which you referred to your prior conversations with the officials in Washington? A. Only generally, beginning in March and continuing through to the time that I sailed for Germany in August, 1927.

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Q. To the best of your recollection, was it shortly after you had had your conversations in Washington that you spoke to Mr. Judd about them? A. Mr. Judd asked me to keep him informed. He had not then determined that the claims should be filed. The matter was under investigation. Mr. Judd asked me for advice from time to time, and I reported the substance of what we were finding. Mr. Judd had given directions to—

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P. 1652 Q. Mr. Avery, state what you said to Mr. Judd with reference to the conversations you previously had had in Washington. A. It is difficult, your Honor, to answer that question, unless I go into detail.

The Referee: Mr. Avery, you had one or two or three interviews in Washington with various people in the State Department. You were asked last week what happened then and were not allowed to testify. Then it later appeared in the evidence that you told Mr. Judd what had happened, and I do not see why you cannot tell us, as far as you remember, what you told Mr. Judd.

The Witness: To the best of my recollection, in that period I saw Mr. Judd as many

as thirty times and probably telephoned him sixty times. I told Mr. Judd of the situation of the memorials of 1922, which had been withdrawn by the estate in 1924; that the executor filed no proofs in support of the memorials; that the theory upon which they were drawn had not met with the approval of the American Agent, particularly the loss of the cargoes was not
P. 1653 approximately caused by Germany's submarine warfare; that the American Agent had stated it had been disallowed in the British 560
Mixed Claims Commission; that the American Agent had said he would entertain a reconsideration of any claims of the American partnership of Crossman & Sielcken. I asked Mr. Judd about Mr. Sielcken's status, that I had heard in Washington that Mr. Sielcken had repatriated himself in Germany, that it was important to have any proof or knowledge that could be gotten in New York in regard to it. I discussed with Mr. Judd the situation of the Boston lawyer, Mr. Stewart. Mr. Judd more than once stated that the estate did not wish to incur any expense. He asked me, 561
if I was going to see Mr. Stewart, to make sure there was no claim for services against the executor by Mr. Stewart. I said I preferred not to raise that question and that it was not part of my work, and he said that it would be all right not to raise it.

I saw Mr. Judd after my return from Boston. I told him that—

Q. Mr. Avery, may I interrupt you? I am not asking about that phase of your conversation with Mr. Judd, because that has been covered. I merely wanted to bring out your conversation with the officials in Washington,
P. 1654 in so far as you repeated it to Mr. Judd.
A. They are all bound up together. I went

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from New York to Boston and from New York to Washington. I told Mr. Judd of the various bureaus. I am not certain that I gave Mr. Judd the names of the officials. I am very sure that I told Mr. Judd about Colonel Osann. Off the record.

(Discussion off the record.)

A. (Continued) I might add on the record, any understanding that I had in Washington in this matter was as attorney for the executor, a possible claimant.

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That was stated to Mr. Judd, and I obtained his authority before I went to the Commission. It was stated to me by Mr. Martin that I was there representing only the estate, that Mrs. Sielcken had no status.

The Referee: You say you stated that to Mr. Judd and he said you could represent the estate to that extent?

564 The Witness: Yes.

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P. 1655 The Witness: I recall I obtained Mr. Judd's authority before I could ask to see the papers and ask for the advice of counsel to the American Agent, and take up the time of the American Agent on the subject. It was on behalf of a particular possible claimant, Crossman & Sielcken in liquidation.

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Q. At the top of page 1619 of the minutes, there appears this part of your answer: "Mr.

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Sielcken took me to Mr. Judd and introduced me. I participated in telling Mr. Judd what
P. 1656 inquiries had been made at the first interview." Do you wish to clear up the second sentence which I have read, and will you please do so if that is your wish? A. I would like to add: "I participated in a conversation between Mr. Sielcken and Mr. Judd, and gave both gentlemen what few facts I had ascertained up to that time."

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Q. At the time of adjournment at the last session, you had brought your narrative down to the point where you had returned to this country from Europe very late in the summer of 1929, and you told us about your trips to Washington in an effort to secure the consent of the United States authorities to the entry of a default judgment against Z. E. G. Will you pick up your story at that point and proceed with it, telling us, first, if you will, about a trip that you and Mr. George W. Alger made to Europe in the Autumn of
P. 1657 that year? A. Arthur Garfield Hays served notice of the taking of a deposition of a Dr. Frisch.

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Mr. Bacon: Hadn't you better put on the record who Arthur Garfield Hays was?

A. (Continued) Mr. Hays, attorney of record in the suit pending in the United States Court, Southern District of New York, against the A. P. C., Treasurer of the United States, in which Z. E. G. was impleaded. He appeared after a lapse of many months.

The Referee: For whom?

The Witness: For Z. E. G. Mr. Hays at that time was absent at a murder trial at Gas-

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tonia, North Carolina, and the matter was handled by Mr. Abramson, his partner.

Mr. Bacon: Hays' assistant?

The Witness: His partner. It was arranged that the executor and claimant would be represented in taking the Frisch deposition in Berlin, with Mr. Abramson. Mr. Alger and I sailed on the "Aquitania" September 18th, stopping at London to examine the records of the Prize Court in the hearings on the seizures in 1915. From there we went to
569 Berlin, and Mr. Abramson appeared. The deposition of Dr. Frisch was taken.

P. 1658 The Referee: What was Mr. Alger's connection?

The Witness: Mr. Alger was trial counsel for the claimant in the case which was tried in December in the United States District Court, before Judge Caffey. Before Mr. Alger and I sailed, we had arranged with the Assistant Attorney-General in charge in Washington that the cargoes case could be brought on by agreement before some Federal Judge
570 who would be available, and very soon.

Dr. Frisch was at the very top of the organization for supplying food to the civilian population in Germany, and, as such, was a very high officer in both the Reichs Einkauf and Z. E. G.

Mr. Bacon: You mean supplying food during the war?

The Witness: During the war, beginning in 1914.

By Mr. Hasbrouck:

Q. Prior to the departure of yourself and Mr. Alger, had you considered the advisability of taking the testimony of Dr. Frisch on written interrogatories? A. Yes.

Q. What conclusion did you reach about that? A. I discussed the subject with my associate counsel, Mr. Alger, and Mr. Barnes; I discussed the subject with Mr. Judd. We decided it was not wise to cable fully to either
P. 1659 Mrs. Sielcken or Mr. Sielcken in Germany. Mr. Hays stated to me that he was informed that Dr. Frisch would testify that he had a personal arrangement with Mr. Sielcken that the risk of seizure was for the seller, Crossman & Sielcken, and that C. & S. guaranteed 572
the safe arrival of the goods at point of destination in a neutral Baltic port. Mr. Judd said there were no funds available, that he approved the taking of the testimony orally, but beyond giving his approval he would not express an opinion; he would give no direction.

Q. How long were you in Germany? A. Nearly two weeks, because Mr. Abramson missed the steamer he expected to sail on.

Q. The deposition of Dr. Frisch being taken, what did you then do? A. Returned to New York. 573

Q. Do you recall when you arrived here? A. October, 1929.

Q. Did you then, together with your associates, start the preparation for the trial of the case pending in the United States District Court? A. The case was well in hand before we went to Germany.

Q. You mean the preparation was well in hand? A. The preparation of the case was well in hand. I went to Washington with a copy of the Frisch deposition, and took it up
P. 1660 at the Department of Justice, and called their attention to the fact that the deposition was purely hearsay, that Dr. Frisch had heard that Mr. Sielcken's firm assumed the risk of seizure.

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Q. When did the case go on for trial? A. The week before Christmas, 1929.

Q. And was actually tried then? A. Yes.

Q. And resulted successfully for the plaintiffs? A. Yes.

Q. What did you do after the conclusion of the trial? A. The result of the trial was discussed between me and Mr. Judd. Mr. Judd attended all of the trial. I telephoned Washington. I believe I did not go to Washington until after the turn of the year.

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Q. In preparing for the trial of this case, did you make use of the records of the firm of Crossman & Sielcken? A. Yes.

Q. They were actually used on the trial, were they not? A. Yes.

Q. The proof was made up largely from those records? A. From the books of Crossman & Sielcken.

Q. Will you proceed with your narrative, P. 1661 please, as to what you did after the successful termination of the trial? A. In January the arrival of counsel for the German Agent 576 brought notice to me of the beginning of conferences in Washington looking to the arrival of the German Agent himself, Von Lewinski, and there were several of those meetings in Washington at different times, leading up to the performance of the tentative agreement for fifty-fifty settlement arrived at in Berlin in April, 1928.

Mr. Bacon: That was first recommended at sixty-forty, was it not, and then afterwards fifty-fifty?

The Witness: Yes. We tried to get sixty for the estate.

Mr. Bacon: If I may interject here, after Von Lewinski came to Washington, sixty-forty

was recommended by him; that was the subject of discussion, was it not?

The Witness: Yes, there was a discussion about the rate of exchange of the German Mark, which would have resulted in an increase to sixty per cent from fifty per cent. Dr. Von Lewinski said that he remembered that the judgment of Solomon had been agreed to in Berlin of dividing the baby.

Mr. Bonynge attempted to get a larger net result by using a different rate of exchange in 578
the settlement. Von Lewinski's reply was that he thought he had a gentlemen's agreement,
P. 1662 but he was not certain what a gentlemen's agreement with a lady meant. Finally, it went through exactly as it was arranged in Berlin.

The Referee: When you say sixty-forty and fifty-fifty, you refer to some liquidated amount, half of which was to be paid in settlement?

The Witness: Yes. We had to reduce the Marks to dollars, and much would depend upon what rate of exchange was used, as to whether, in returning to the estate and to Crossman &
Sielcken in liquidation—what they got in dol- 579
lars.

The Referee: There had been an agreement, then, in Berlin on an amount of Marks that was due somebody over here?

The Witness: Not quite. The agreement was that right straight through there should be an even division, even extending to the moneys in possession of the A. P. C.

The Referee: Even division between whom? That is what I cannot get into my head.

The Witness: The estate was to take one-half and the Germans were to get the other half, or to be released from the other half of the—

The Referee: In other words, there was to
P. 1663 be an agreement on the claim, and the German

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Government was claiming either 60 per cent or 50 per cent?

The Witness: Or to receive 50 per cent, because they received one-half of this Z. E. G. money which came from the A. P. C., and they paid one-half of the settlement which was necessary to make with the house of Theodor Wille.

By Mr. Hasbrouck:

Q. How long did these conferences to which you have referred continue? A. Down to within a week of the entry of the compromise award by the Mixed Claims Commission.

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Q. When was that award entered? A. April, 1930.

The Referee: That was an award to the executor?

The Witness: Award to the claimants.

The Referee: Who were the claimants?

The Witness: The claimants were Crossman & Sielcken, an American partnership.

Mr. Wrubel: Was not the claim made in the name of Sorenson & Nielsen as liquidating partners?

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The Witness: I would have to refresh myself from the—

Mr. Hasbrouck: The memorials are in evidence, your Honor. They speak for themselves.

Mr. Bacon: The action was brought in the names of Sorenson and Nielsen alone, was it not?

P. 1664

Mr. Hasbrouck: I think that is correct.

Mr. Bacon: And the memorials were filed with three names. I suppose we can agree that the Columbia Trust Company and the Columbia-Knickerbocker Trust Company and the Irving Trust Company are all the same corporation?

Mr. Hasbrouck: Yes.

The Referee: I think that is in the pleadings.

Mr. Hasbrouck: I offer in evidence a copy of a letter from Earl B. Barnes to Arthur Garfield Hays, dated March 27, 1930, together with a copy of a letter thereto annexed from Clara Sielcken-Schwarz to Messrs. Brainard Avery and Earl B. Barnes, bearing the same date, and the approval endorsed thereon of the executor of the will of Hermann Sielcken.

Mr. Bacon: Also, at the foot of the letter itself, there is the underwriting, "The foregoing is in accord with my understanding of 584
the terms of settlement hereinabove described." Signed by Mr. Hays.

• • • • • •

Mr. Bacon: No objection, subject to verification.

(Received in evidence and marked Petitioner's Exhibit 345.)

P. 1665 Q. Were releases executed in connection with the settlement, Mr. Avery? A. Yes.

Q. Was it necessary to send certain of them to Germany before the settlement could be 585
finally effected? A. Yes.

Q. Do you recall when they were returned from Germany? A. April 19, 1930, I believe.

Q. Now, when were the terms of the settlement, in part at least, first carried out? A. April, 1930.

Q. There was a subsequent distribution under the terms of the award in June following, was there not?

Mr. Bacon: Partial distribution, you mean.
Mr. Hasbrouck: Partial distribution.

A. Yes, the steps taken were the surrender by the A. P. C. of the Z. E. G. money, in accordance with the decree of Judge Caffey's court. Those moneys remained in escrow until after the compromise award had been entered

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and the payment of German funds from the United States Treasury was made.

Mr. Hasbrouck: I offer in evidence a copy of a letter from Brainard Avery to Crossman & Sielcken in liquidation, John S. Sorenson and Thorleif S. B. Nielsen, liquidators, dated April 24, 1930.

Mr. Bacon: Subject to verification, I have no objection.

P. 1666
587 (Received in evidence and marked Petitioner's Exhibit No. 346.)

Q. While these negotiations were proceeding, and the settlement finally agreed upon was being carried out, did you learn of the existence of any claims against the estate resulting from these recoveries? A. Yes.

Q. What were they and by whom were they brought to your attention? A. A lawyer representing Mr. John S. Sorenson called on me with an auditor, saying that Mr. Sorenson made a claim. In the spring of 1930—

588 Mr. Bacon: Who was the lawyer?

The Witness: Nielson Olcott.

A. (Continued) In the spring of 1930, one of the export managers, Mr. Kilpatrick, called upon me, and later his lawyer, Mr. Gregory, called. Mr. Stewart of Boston called on me in person, I think in June, 1930, saying that he claimed a share of the judgment against the A. P. C.

Q. What was the claim of Mr. Sorenson, in so far as you were advised of it at that time? A. Mr. Olcott took the general position that the facts of the recovery fell within the theory of a Federal tax case called Sanford & Brooks, that the losses, having been written off and were subsequently recovered, thereupon became realized profits *in toto*, and that the recov-

P. 1667 eries, on his theory, being entirely profits, Mr. Sorenson was entitled, under his partnership arrangement, to 12 1/2 per cent of the entire recovery of the entire compromise award.

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P. 1670 Mr. Hasbrouck: I also offer in evidence a copy of a letter dated April 17, 1930, from O. R. Judd, Vice President, to Leonard B. Smith, including the annotation on the second page that a copy thereof was sent to Mr. Avery and a copy to Mr. Hotchkiss. 590

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P. 1671 The Referee: It will be admitted.

(Copy of letter dated April 17, 1930, from O. R. Judd, Vice President, to Leonard B. Smith, received in evidence and marked Petitioner's Exhibit No. 348.)

Q. After the receipt of Petitioner's Exhibit 347, which I now show you, will you tell us what you did? A. There were constant meetings with counsel and an accountant representing Mr. Sorenson. 591

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P. 1672 During the summer Mr. Woody, counsel for Nielsen, spent some time with me on the subject of a possible claim that Mr. Nielsen might make. Mr. Nielsen himself made no claim in his lifetime to me.

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P. 1674 Q. Did you go abroad in the autumn of that year in connection with this matter? A. Yes.

Q. When did you go? A. October.

Q. Where did you go and whom did you see? A. Paris, and met Mrs. Sielcken and Mr. Sielcken.

Q. And what did you do while you were there? A. I showed them all the material, all

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the important material, the material which I deemed important, which I had obtained up to that time.

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Q. Did you have a conversation with them while you were there? A. Yes.

Q. Tell us what it was.

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A. My hurried trip to Paris related particu-
593 larly to Mr. Sorenson's claim. The attorney and accountant had formulated a claim upon a theory which, if accepted, gave him a substantial interest in the recoveries, that is, one-eighth. The papers and records furnished me by the executor showed, as near as—

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The Witness: I told the Sielckens that the papers which we had been able to analyze showed, in the opinion of William Martin and myself, that Mr. Sorenson had been overpaid to a very large amount.

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Q. Proceed. A. I told Mrs. Sielcken and Mr.
P. 1676 Sielcken that the statements which I brought with me, formulated upon the theory which Mr. William Martin and myself were working on, showed an overpayment to Sorenson & Nielsen of nearly a quarter of a million dollars.

The Referee: By the executor?

The Witness: No, at the close of business in September, 1917, which was several months before the appointment of the executor.

The Referee: Who overpaid them; who did you say overpaid them?

The Witness: They took the money themselves, but, as I told them, it appeared to be with the approval and assistance of the Irving Trust Company.

Q. Do you recall anything else that was said at that time? You must have had more conversation than on this one point. A. The working sheets were examined in detail by Mr. Sielcken with me. Much time was given to the question of adjusting with Mr. Sorenson.

Q. By "adjusting," you mean his claim, I take it? A. By either adjusting his claim or recognizing his services, not only throughout the recoveries but for many years to Mr. Sielcken personally, and I explained to them the emergency that had caused me to make a round trip on the "Aquitania" to meet them in Paris, which emergency was explained by Mr. Sorenson's lawyer to be his serious financial position, that if anything was to be done for him it should be done promptly, and might be of assistance to him in getting the business in New York going.

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P. 1677

Q. Mr. Sorenson was then engaged in business in New York? A. Yes.

Q. As a member of the firm of Sorenson & Company, was he not? A. Yes.

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Q. How long were you on the other side? A. About five days. I made a round trip on the "Aquitania."

Q. Do you recall when you arrived in New York on your return? A. Yes.

Q. When was it? A. October, 1930.

Q. Did you have any conference or conversation with anyone after you returned with reference to the results of your trip? A. Yes, immediately.

Q. With whom? A. In the first instance, with Mr. Judd, Mr. Warren and Mr. Hotchkiss, and then, immediately following that, Mr. Sorenson's counsel, Mr. Olcott.

Q. What did you say to Mr. Judd, Mr. Warren and Mr. Hotchkiss, and what did they say

P. 1678

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to you? A. I told them that Mrs. Sielcken could not understand the apparent overpayment to Mr. Sorenson, but that she expressed herself as grateful to those who had been helping in the recovery; that during his lifetime Mr. Sielcken had expressed his high opinion of Mr. Sorenson; that she sympathized with the business troubles that threatened to overwhelm him; that she supposed she had made all the business arrangement necessary with Mr. So-

599 renson in 1927, which was a letter which Mr. Sorenson had written her, which she had accepted, paying him $4,000 for his work in connection with the recoveries; that she, subject to the approval of Mr. Hotchkiss, wished an immediate adjustment made with Mr. Sorenson, and that if such an adjustment was to be made, the funds were to be provided.

Q. Adjustment of what? A. Of Mr. Sorenson's claim, whether it was just or unjust.

The Referee: The funds were to be provided by whom?

600 The Witness: That was to be arranged between Mr. Warren and the Chase and Mr. Judd and the Irving.

Q. What, if anything, did you do after your return with reference to the adjusting and settling of the claim of Mr. Sorenson? A. There was a settlement made in which Mr. Sorenson received nearly $60,000, and I purchased Mr.

P. 1679 Sorenson's claim in the name of Mr. Sielcken.

Mr. Bacon: Mr. Alex Sielcken?

The Witness: Mr. Alex Sielcken, for $30,000, which was part of the $60,000. Mrs. Sielcken had some notes of Mr. Sorenson, which loans had been made during the pendency of the claims, and a partial adjustment was made of those notes.

Q. A settlement was consummated on substantially that basis, was it not? A. Yes.

Q. Now, during this period, do you know whether the examination of the books and records of the firm, to which you have already referred, was continued? A. No, not continuously during the fall. The Nielsen claim was being pressed, also the managers', and then Mr. Stewart's. The settlement with Mr. Sorenson came, and for a period I was busy with Mr. Woody's assistant, in giving them the figures on the 602
theory which I had of the affairs of Crossman & Sielcken.

The Referee: Woody representing—?

The Witness: Mr. Nielsen's estate, the ancillary executor of Mr. Nielsen's estate, the Chase National Bank.

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P. 1680 Q. It was at about this time, was it not, that the action of the Nielsen estate was commenced? A. Yes, November, 1930.

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P. 1683 Q. Who then represented Mr. Sorenson? A. First, Mr. Welch, and then Mr. Tibbetts and Mr. Welch.

Q. Were they members of a firm, do you know? A. Later Mr. Welch became associated with Tibbetts, Lewis & Rand.

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The Referee: Was there a suit brought to set aside the Sorenson settlement?

The Witness: Not a separate suit, but Mr. Sorenson was made a defendant in a suit by
P. 1684 the executor of the estate of Mr. Nielson, a brother-in-law, and he reserved the right in that suit to ask for affirmative relief.

Q. Were you advised at that time that Mr. Sorenson would repudiate the settlement that

had been made? A. Yes; when Mr. Welch first came in, Mr. Sorenson insisted on completing the liquidation, as he claimed to be a liquidator of Crossman & Sielcken and not an employee of the executor.

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Q. Had a tax situation developed early in 1931, Mr. Avery, with reference to the Sielcken estate? A. Yes, the question of reporting the 1930 recoveries arose in connection with the
605 tax return which was due March 15, 1931.

Q. What, if anything, did you do in connection with that? A. That matter was placed in my charge by Mrs. Sielcken and the executor.
P. 1685 Q. What did you do? A. I retained Judge Hamel, a former Chairman of the United States Board of Tax Appeals in Washington. I retained the services of Mr. James Miller, a C. P. A. connected with the firm of accountants of Weiss & Company, New York, and spent considerable time with Mr. Miller and Mr. William Martin in getting data for the tax return.
606 That was complicated by Mr. Sorenson filing a separate tax return upon a different theory than that recommended by Judge Hamel.

The Referee: Sorenson as an individual or Sorenson as liquidating partner?

The Witness: Sorenson as surviving partner of the firm of Crossman & Sielcken, I mean; Mr. Sorenson alleging that he was surviving partner, and taking the position that the recoveries were 1930 profits. Our position was that it was recovery of capital.

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P. 1689 Q. What did you do after the trial of the Nielsen case commenced in December of 1931? A. We were engaged constantly daily together with Mr. Alger and Mr. Hasbrouck in conducting the defense of the Nielson case.

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P. 1690 Q. When did Mr. Wolff render his decision in that case? A. I think February, 1938.

Q. When was the petition in the proceeding now on trial filed in the Surrogate's Court? A. March, 1932.

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P. 1695 Q. This round trip of yours on the "Aquitania" was in October, 1930? A. Yes.

Q. And at that time you saw Mrs. Sielcken and Mr. Sielcken in Paris? A. Yes. 608

Q. Did you tell them at that time that you were acting under retainer by the executor? A. I cannot remember the word "retainer" being mentioned. There were frequent allusions during our conference to the complete harmony between Mr. Judd and myself and Mr. Hotchkiss. Mrs. Sielcken was told of the meeting just before I sailed, with Mr.
P. 1696 Judd, Mr. Hotchkiss and Mr. Warren, and their views about the advisability of dealing with Mr. Sorenson—about the executor dealing with Mr. Sorenson, and Mrs. Sielcken's authorizing it. I cannot be definite that the 609 letter of retainer was discussed. The pendency of the claims of the managers, and that my firm would attend to their defense, was fully discussed with Mrs. Sielcken, and that we would appear for the executor and were conferring with counsel for the claimants. That was gone into in great detail with Mrs. Sielcken and Mr. Sielcken at this time in Paris.

Q. You told Mrs. Sielcken and her son that, in your opinion, Mr. Sorenson had been overpaid; is that right? A. As far as I could ascertain, Mr. Sorenson had overdrawn. The word "overdrawn" was used.

Q. And Mr. Nielsen also? A. And Mr. Nielsen, to the extent of $120,000, and they had taken salary in excess of $9,000 each, and

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other items at the close of the business of Crossman & Sielcken in 1917.

Q. Did you tell them that those payments were made with the knowledge of the executor or of the Columbia Trust Company? A. I don't remember that I did. The situation was not very clear at that time. The executor qualified, as I remember, as temporary administrator, about Christmas time of 1917, and became

P. 1697 executor on January 26, 1918.

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Q. Did they not ask you whether there was some way of recovering the overdrafts of Sorenson and Nielsen? A. They did.

P. 1697 Q. What did you say to them? A. Mr. Sielcken expressed the opinion—

Q. What did you say to them, Mr. Avery? A. I am trying to say Mr. Sielcken had expressed the statement that Mr. Sorenson would be unable to respond. I told them that the Nielson estate was a New Jersey estate and that it would be worth while looking into proceeding

612 against the estate in New Jersey.

Q. Did you tell them that you discussed the question of these overdrafts or overpayments with Mr. Hotchkiss or Mr. Judd? A. Yes, and with Mr. Warren.

P. 1698 Q. Did you tell them in any way that the executor could be made responsible for these overpayments? A. I have no recollection of any such conversation in Paris, in 1930.

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P. 1699 (Recess from 1:00 P. M. to 2:15 P. M.)

After Recess.

BRAINARD AVERY, resumed.

Direct Examination (continued) by Mr. Hasbrouck:

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P. 1705 Q. When you first went to the State Department about March 1, 1927, Mr. Avery, were you under employment by Mrs. Sielcken? A. No.

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Q. Under whose employment were you? A. No one.

Q. This was after you had been consulted by Mr. Alex Sielcken about the matter, was it not? A. No.

B. Avery—Cross:

P. 1705 Q. I thought you testified that you saw him in February and talked over the question of these cargoes with him. A. That was a casual conversation, in which I told him that I would make some inquiries in Washington when I was there on another case. I did so.

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P. 1706 Q. Do you recall the name of the man in charge of claims against Great Britain whom you saw in the State Department? A. No, except it was a French-sounding name. I would recognize it if you would read it to me.

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Q. When Mr. Sielcken took you to Mr. Judd and introducted you to Mr. Judd, what did he say? A. Mr. Sielcken or Mr. Judd?

Q. Mr. Alex Sielcken. A. Something to the effect that "This is Mr. Avery, about whom I have been talking about the fat backs matter." We called the Copenhagen cargoes, in the first instance, fat backs.

Q. Did you not say that you were representing his mother in that matter? A. I recall nothing of that kind at present.

Q. You also spoke of calling at the office of the American Agent of the Mixed Claims Commission, United States and Germany, on your
P. 1707 first visit there. Whom did you see there? A. Mr. H. H. Martin.

Q. The Counsel to Mr. Bonynge? A. Yes.

Q. You say you saw the Stewart files in Bos-
617 ton shortly after that? A. Yes.

Q. In March, 1927? A. Yes.

Q. You later got those files from Mr. Stewart? A. Yes, I think they were the same files I saw.

Q. You found in those files, did you not, a letter from Mr. Nielsen to Mr. Stewart, explaining that Wille had, I think, a forty per cent interest in the cargoes, antedating the employment of Mr. Stewart? A. No, I did not see it at that time.

Q. When did you see it? A. To the best
618 of my recollection, I saw it following Mr. Sorenson's statement to me of the one-half interest in the joint account with Wille.

Q. When was that? A. In the spring of 1927.

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P. 1714 Q. I call your attention to this letter of yours, Exhibit 10084, and ask you if you do not find a a quotation from that letter in there? A. Yes,
P. 1715 there is a quotation.

Q. Do you wish to correct your answer, then, to that? A. No. In March, 1933, Mr. Bacon was engaged in preparing the defense of the Stewart suit. At that time Mr. Bacon had the Leonard B. Smith files.

Q. Do you claim to know that of your personal knowledge, Mr. Avery? A. Mr. Bacon said he had them and sent me some of these papers

to examine. I admit that on March 3, 1933, there was a copy of a letter from L. B. Smith to F. H. Stewart that contained that quotation. My belief is that Mr. Bacon sent me excerpts or possibly a file, and asked me to patch it out. Mr. Bacon asked me to communicate with Mr. Sielcken, and this letter of March 13, 1933, was my answer to Mr. Bacon's request to co-operate in enabling him to prepare the defense of the Stewart claim. It is possible I may have seen the whole letter, and yet it gives Mr. Stewart 620 the lie from the jump.

Mr. Bacon: If there is no objection on the ground of its being a copy, I will offer this letter from Mr. Smith to Mr. Stewart of May 7, 1924, sir.

P. 1716 The Referee: I will receive it.

Mr. Hasbrouck: The petitioner is in no way connected with it, your Honor.

The Referee: The petitioner is criticizing the acts of the executor.

Mr. Hasbrouck: The witness has testified—

The Referee: Excuse me, sir. The petitioner 621 is criticizing the acts of the executor. The executor was acting on the advice of counsel. Apparently, the ultimate result showed that counsel advised them incorrectly. This, at least, is some evidence that the counsel upon whose opinion the executor acted knew the facts which Mr. Avery ultimately developed, and that the petitioner was not concealing these things from counsel. That is the only purpose I can see it for.

Mr. Bacon: Concealing it from the Government, sir.

The Referee: Or concealing it from the Government people. In other words, if the executor acted in good faith on the advice of counsel,

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there is some testimony here that they investigated Stewart & Chase and found that they were reputable people, and if counsel advised
P. 1717 them wrongly, that at least is a fact which is relevant to the situation.

I will receive Exhibit 10086 in evidence.

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Mr. Bacon: So that your Honor understands the exact relationship—I do not think there is any question about this, but I may explain it—
623 the first memorials were filed in 1922. The claim on these Copenhagen cargoes, I think, was predicated on the theory, which they were advised by counsel in Washington was then thought to be correct, that the German Government was responsible for seizures made by the British Government in retaliation for the submarine policy of Germany.

P. 1718 While that was pending, a decision adverse to that claim was announced in another case.

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624 Mr. Bacon: Then Mr. Stewart came in and thought he could present a claim against the British Government. That was the second claim.

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P. 1721 Q. What item of information, if any, did you get from any files of the executor, from any files in its possession or books in its possession, that indicated that Z.E.G. was the purchaser of the cargoes?

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P. 1722 A. I learned one-half of the fat backs cargoes—

By Mr. Bacon:

Q. I am not asking for your conclusion. What information did you get? A. I learned from them—

The Referee: From what?

The Witness: From the files and records of the executor.

Q. I want to know just what information you got there, not what conclusion you drew from it.

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P. 1723 The Witness: No, I learned from the books of Crossman & Sielcken that one-half of the Copenhagen cargoes were owned by Theodor 626
Wille and were charged in a joint account to
P. 1724 them.

The Referee: What books?

The Witness: The books of the company.

By Mr. Bacon:

Q. You mean owned by Willie? A. No, by Wille on the books of Crossman & Sielcken. I learned that Theodor Wille was a German enemy.

The Referee: What books did you learn 627
this from?

Mr. Bacon: I will concede that that was entered up, that Wille owned half the cargo. That is entered right up on the books. There is no question about that.

The Witness: This information appears on the books of Crossman & Sielcken in several places.

Q. Any other items of entries on the books, or letters in their files bearing on the question of Z.E.G. being the purchaser, you obtained from their books and papers?

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P. 1727 The Witness: The books of Crossman & Sielcken show that Harry Levin and Beckmann

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& Jorgensen were the consignees of the Copenhagen cargoes.

By Mr. Bacon:

Q. All of them? A. Except the Paulsen.

Q. Can you turn to the entries on the books that show this? A. I had and may have the duplicate original bills of lading.

Q. Will you produce those? A. If we can find them. The copy of the Prize Court decision stated that Levin and Beckmann & Jor-
629 gensen were agents for Reichs Einkauf.

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P. 1727 A. (Continued) I put the three things together and found Z.E.G.

* * * * * *

P. 1728 Q. You spoke of the item of claim of Crossman & Sielcken against Theodor Wille, and also of a settlement of that claim, which you afterwards referred to as an adjustment made by the German executors. I suppose you mean
630 the German executors of Sielcken, do you not? A. Yes.

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Q. I show you this photostatic copy, certified by Mr. Martin, of exhibits to the German answer, and ask you if the exhibits, A, B, C, D and E, and the translations appended to that German answer of those documents, are the documents with regard to that adjustment or settlement, whatever you call it. Each document, I think, is given in German, followed by a translation into English.

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P. 1729 A. I cannot identify these papers, except that they were produced by Dr. Hugo Israel in Berlin in March, 1928, as a record of what

had happened in Germany, and they were used in arriving at the adjustment of the compromise award, as being true.

Q. True copies? A. As being a record, a true record of the fact.

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The Referee: Mr. Avery, if I remember correctly, testified that in his conference in Berlin with the Foreign Office officials, the question of the settlement or adjustment of affairs between Wille & Company and the German executors arose, and that there had been an adjustment which was taken into consideration in the final settlement. 632

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P. 1730 Mr. Bacon: You made one slight misstatement in your statement. You said that was a settlement with Wille. This is the settlement with Z.E.G.

The Referee: I beg your pardon. I will admit them.

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P. 1731 Q. When was this answer of the German Government to the Z.E.G. memorial filed, do you recall? A. October 30, 1928.

Q. And you received a copy promptly? A. I had these exhibits in Berlin in March, 1928.

Q. You saw them in March, 1928? A. Yes.

Q. And then you received copies of them in connection with the answer of Z.E.G.? A. Again I received copies in the answer.

Q. Did you have any talks with Mrs. Sielcken about that compromise with Z.E.G.?

Mr. Hasbrouck: When?

Mr. Bacon: After seeing these papers, or before.

A. Yes.

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Q. Can you fix the date? A. April, 1928.

Q. And where was that? A. At her place in Holstein.

Q. Did you tell her that these papers had been shown you? A. Yes.

P. 1732 Q. What did she say? A. I recall no comment by her.

Q. Did she then say to you anything about knowing about that settlement previously, or adjustment, whatever you call it? A. She said

635 she had never heard of Z.E.G., nor of the arbitration. I told her I was instructed by Dr. Von Lewinski to ascertain whether the nominal claims of the memorials could be reduced approximately one-sixth. He said that if such a deduction or withdrawal was made, he would discuss adjustment as to the balance of the claim.

Q. What did she say to that? A. The answer came from Mr. Alex Sielcken.

• • • • • •

Q. What was that answer? A. To take any-

636 thing I could get from Germany above a million dollars.

Q. Had you any discussion with Mrs. Sielcken at any time, and, if so, when first, about the prior adjustment with the firm of Theodor Wille? A. I recall none, except as it was raised by the German conferees in Berlin, and I reported it to her.

Q. When was that? A. This was at the time of the meetings in Berlin in March and April, 1928. I met her in Holstein and in Hamburg, and frequently telephoned Mr. Alex

P. 1733 Sielcken.

• • • • • •

P. 1735 A. The German Agent handed me a statement of the account of Theodor Wille with

Crossman & Sielcken. One of the accounts was known as Prado, a Brazilian transaction, which they declined to discuss.

The Referee: Who declined to discuss?

The Witness: The Germans. The cable transfer of the million dollars in August and September, 1916, they offered to prove was correct. The Germans claimed that they had handed, after the war, a quantity of German war bonds in settlement of Wille's account with Crossman & Sielcken, about three million Marks par value. Mrs. Sielcken had disposed of these bonds, as I recall, during the inflation, when she received them, for a sum not much in excess of $1,000. At the beginning the Germans claimed this was a settlement with Mrs. Sielcken. I then asked them that, assuming it was a settlement, would they prove that Wille had bought the bonds? They showed no document of settlement.

638

P. 1736

• • • • • •

P. 1739 Matter of Hermann Sielcken, continued. 639

43 Exchange Place,
New York, N. Y.,
January 18, 1935, 10:30 A. M.

Before: Walter N. Seligsberg, Esq.,
Referee.

Present:

Howard Hasbrouck, Esq.,
Brainard Avery, Esq.,
Albert Avery, Esq.,
Selden Bacon, Esq.,
David S. Hecht, Esq.,
Robert W. Wrubel, Esq.

640 *Exhibit T Annexed to Affidavit of Frank C. Sterck*

BRAINARD AVERY, resumed:

Mr. Bacon: I would like to offer this copy of the docket entries of the United States District Court for the Southern District of New York, in the case of Sorenson & Nielsen v. Sutherland, Frank White and Z.E.G.

• • • • • •

(Received in evidence and marked Respondent Irving Trust Company Exhibit 10091.)

641

P. 1740 *Cross Examination (continued) by Mr. Bacon:*

Q. That case, Mr. Avery, was tried before Judge Caffey without a jury, was it not? A. Yes.

• • • • • •

P. 1785 Q. Mr. Avery, you testified to certain settlements, or adjustments, which you preferred to call them, with Theodor Wille by Mrs. Sielcken. Were the figures of $32,454.42 and $62,062.50 the amounts which Mrs. Sielcken received under that adjustment?

642

• • • • • •

The Referee: The question of these adjustments came up in one of your visits to the Foreign Office in Berlin, did they not, and all
P. 1786 the data offered here on that subject was the basis of your opinion?

The Witness: Which was used, yes.

Q. But you asked Mrs. Sielcken about them, did you not? A. Yes.

• • • • • •

The Referee: Do you know, Mr. Avery, whether those were the amounts that Mrs. Sielcken received?

The Witness: I do not know.

Q. Do you recall what Mrs. Sielcken said to you about them? A. Yes, that there had been

some payment received by her directly or indirectly from Theodor Wille.

Q. Did she tell you the amount? A. I mentioned to her the amount, and I understood her to acquiesce.

Q. What was the amount you mentioned? A. My recollection is it was around $30,000.

The Referee: Which was undoubtedly the amount that you derived from those papers
P. 1787 that you saw in Berlin? 644

The Witness: Yes, the transcript of the Wille books furnished the German agent.

* * * * * *

P. 1789 Q. Mr. Avery you said that in 1929, when you were over with Mr. Alger, you examined the record in the Prize Court case? A. Mr. Alger did.

Q. You did not? A. Not then.

Q. Did you yourself examine it at any other time? A. Yes.

* * * * * *

P. 1790 Q. I call your attention to this letter signed 645
"H. Sielcken," addressed to "My dear Mr. Sorrenson," dated September 22, 1914, and ask you if you saw that paper in the files of Crossman & Sielcken? A. Yes.

* * * * * *

(Letter from H. Sielcken to Mr. Sorenson, dated September 22, 1914, received in evidence and marked Respondent Irving Trust Company Exhibit 10103.)

* * * * * *

P. 1794 Q. Now, at page 1676, do I understand that you told Mr. and Mrs. Sielcken in 1930, that the taking of the $120,000 apiece, or thereabouts, by Sorenson and Nielsen, was done with the assistance of the Irving Trust Company? A. Yes, I told them that the drawing out of those 1917 profits appeared to be with the assistance of Mr. Warren of the Irving.

646 *Exhibit T Annexed to Affidavit of Frank C. Sterck*

Q. On what fact did you predicate that statement?

A. The following facts, as I believed I had found them:

P. 1795 In the period, June 2nd to December 31, 1913, Crossman & Sielcken was in the red; for the calendar year 1914, C. & S. was in the red; for the calendar year 1915, C. & S. was heavily in the red; for the calendar year 1916, C. & S. was
647 in the red; for the nine months ending September 23, 1917, C. & S. made $960,000 of profit, which had been divided; that I had examined how those profits were made up and had a list of them; that that matter had apparently been gone into with Mr. Warren of the Irving Trust Company, the checks had been drawn by Mr. Sorenson and sent up to Mr. Warren for approval; that the approval had been given and the checks had been cashed.

P. 1796 Q. At page 1678, you said there was a settle-
648 ment made in which Mr. Sorenson received nearly $60,000, and that he assigned his claim to Mr. Alex Sielcken for $30,000, which was part of the $60,000, and then you said she had some notes. Was the balance of the settlement money credited on notes that Mrs. Sielcken held of Mr. Sorenson? A. The amount received by Mr. Sorenson was in cash, and a credit on notes.

P. 1797 Q. The notes exceeded that other $30,000? A. Yes.

Q. And the balance of the settlement was credited on the notes? A. No, Mr. Sorenson received his money, $30,000 in cash, from Mr. Sielcken through the Chase Bank, and there was an adjustment made by reducing Mr. Sorenson's notes.

Q. I say, the balance of the settlement was done by a credit on the notes? A. Yes.

Q. Now, in the Nielsen case, Sorenson filed a counterclaim, did he not, in his answer? A. He claimed to be liquidator.

* * * * * *

P. 1798 Q. And that issue of whether he was the liquidator of the firm or the Trust Company was decided adversely to his contention, was it not? A. By the Referee. yes.

Q. And judgment entered? A. Yes.

* * * * * *

P. 1843 Q. In the cargo suit, I mean the suit against 650
Z.E.G. in the District Court here, that was entirely conducted by your firm and those retained by you, was it not? A. Yes.

Q. Including some or all of the gentlemen that you have mentioned? A. Mr. Alger and Mr. Barnes and myself.

Q. The Irving Trust Company was not even a party to that suit, was it? A. No.

Q. But it was joined in the memorials? A. Yes.

Q. Neither Mr. Smith nor any member of the firm of Davies, Auerbach & Cornell were in any way active in the conduct of those proceedings, 651
were they? A. Yes.

Q. How, and who? A. Mr. Hotchkiss was acting personally for Mrs. Sielcken. He examined the drafts of the memorial, and I think the
P. 1844 briefs. Mr. Leonard B. Smith paid some casual attention to the matter. I don't recall any action or advice given by Mr. Smith, approval or disapproval.

* * * * * *

P. 1847 Q. Whose idea was it to bring the suit in the District Court in the names of Sorenson & Nielsen without mentioning the executor or joining the executor as a party? A. I think it was mine.

Q. What reason had you for proceeding in that way?

* * * * * *

652 *Exhibit T Annexed to Affidavit of Frank C. Sterck*

A. I wanted to make the suit stick.

P. 1847 Q. What had the omission of the executor from that suit to do with that matter?

* * * * * *

Q. In your judgment? A. At that time, all of 1927, I knew that Mr. Sielcken had died in an enemy country, that under the Trading with the Enemy Act, he had an enemy status, that Mr. Sorenson and Mr. Nielsen had no such obstacles

P. 1848 to overcome, the executor not being in any bet-

653 ter position than Mr. Sielcken himself. Congress had passed an Amendment specifically appropriating the money reported by the Equitable Trust as Unknown Enemy No. 1 for the benefit of the dollar bondholders. Papers were drafted for a mandamus proceeding in the District of Columbia against the Treasurer of the United States, preventing or seeking to prevent the payment by the Treasury of this money to the dollar bondholders who were said to be creditors of Germany, the distributee of Z. E. G. in liquidation.

654 Q. By "dollar bondholders" you mean holders of German bonds payable in dollars? A. Yes. The elimination of the executor was thought to simplify the litigation and to remove the question of Mr. Sielcken's being physically present in Germany.

Q. At the time you prepared that bill, you were familiar, were you not, both with the articles of co-partnership and the will? A. The bill was prepared in the first instance by Mr. Barnes, but we were both familiar with the papers.

Q. With those two documents? A. Yes.

Q. And you were at that time familiar with the fact that Sorenson and Nielsen had been settled with in December, 1917? A. No.

P. 1849 Q. Did you not know there had been paid them about $120,000 apiece at that time? A. No,

I never knew anything about the internal affairs of Crossman & Sielcken until much later. It was not my job.

Q. Now, did the Irving Trust Company in any way itself, or by its own attorneys, take any part in the preparation or form of these memorials and of this bill in equity? A. Everything that was done was done with the knowledge of Mr. Judd, but I can think of no paper or criticism of a paper writing which was prepared by counsel for the Irving in these matters. 656

Q. Or by Mr. Judd? A. Mr. Judd's part was to keep himself closely informed of what was being done and what was intended to be done.

Q. Did he make any suggestions about the form of the papers, or any corrections of them? A. I remember several discussions with Mr. Judd, but they were largely of an informatory nature to him. He said he wanted to help, and did give us papers and access.

Q. Do you recall making any changes in the papers in response to any suggestions from him that the papers should be changed? A. I remember Mr. Judd asking why the executor was 657 omitted from the suit which was tried before Judge Caffey.

P. 1850 Q. That is the Z. E. G. case? A. Yes.

Q. Did he make any suggestion of change in the papers? A. I can think of nothing of importance.

* * * * * *

Q. Did you have any consultations with Mr. Hotchkiss over the form of the papers you filed? A. There were a few discussions with Mr. Hotchkiss, but my recollection is that they were more in the nature of keeping him informed of what was going on.

Q. He did not attempt to advise you about them, did he? A. No, I think not; he made efforts to get papers.

Q. For you? A. In aid of these claims, as did Mr. Judd.

658 **Exhibit U Annexed to Affidavit of Frank C. Sterck.**

Copy of account of Theodor Wille on the books of Crossman & Sielcken, dated September 30, 1917, charging Theodor Wille with one half of the loss on the cargoes which were seized by the British Naval Authorities in April, 1915.

Petitioner's Exhibit No. 534, 5/25/35 L. C.

659 *Defendant Irv. Trust Co.'s Exhibit 41, Feb., 1932 B. G.*

Sept 30, 1917.

Theodor Wille, N. Y. a/c, Dr.

To Crossman & Sielcken, J/A, Copenhagen Cargoes, To amount of Theodor Wille's half share of loss on Copenhagen Cargoes, shipped in 1915, as follows: (seized by British Govt.).

1915

Feb. 27—per "Hilding"		95,578.29
660 Feb. 23— " "Arkansas"		48,686.81
" 30— " "Hellig Olav"		28,105.99
Feb. 13— " "Gunborg"		43,997.16
" 23— " "Indianic"		53,471.41
" 28— " "Oscar II"		83,625.87
		353,465.53
May 26—Received for cereals "Oscar II"		8,050.44
		345,415.09

(4/259)

Exhibit U Annexed to Affidavit of Frank C. Sterck. 661

Add

Copenhagen Expenses—paid by Theodor Wille—	20,206.39		
Legal fees—London & N. Y.	14,533.47		
Interest to Sept. 30/17 @ 5% =	40,695.61	75,435.47	
		420,850.56	
Less Profits on Cargoes paid for—		66,641.60	
1/2 of which		354,208.96	= 177,104.48

662

663

664 **Exhibit V Annexed to Affidavit of Frank C. Sterek.**

Letter dated March 24, 1930 from Arthur Garfield Hays, attorney for the Zentral-Einkaufs-Gesellschaft, to The Attorney General, advising that the Zentral-Einkaufs-Gesellschaft would not take an appeal from the decree.

Address Reply to
"The Attorney General"
and refer to
665 Initials and Number

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

March 24, 1930.

9-17-9-9394

File
LER

The Honorable,
The Attorney General,
666 Washington, D. C.

Attention: Mr. Rhodes.

Sir:

In Re: Sorenson & Nielsen v. Sutherland, *et al.*

This is to advise that the Zentral Einkaufs Gesellschaft will not take an appeal from the decree entered in the above matter dated December 30, 1929, and entered January 2, 1930.

Yours truly,

ARTHUR GARFIELD HAYS,
Atty. for Zentral Einkaufs Gesellschaft.

(Stamped):

Mar 31 1930

C Civil Div.

Apr 1 1930

Exhibit W Annexed to Affidavit of Frank C. Sterck. 667

Letter dated March 27, 1930, from Earl B. Barnes and Brainard Avery to Arthur Garfield Hays, setting forth the distribution of the proceeds of the award of the Mixed Claims Commission and of the amounts received in satisfaction of the decree entered by this Court in the instant suit in the Southern District of New York.

Telephone: Rector 1703-1704 Cable Address: Averwhit

BARNES, AVERY & WHITING

668

100 Broadway
New York

Supreme Court
New York County
Mar 4, 1931
Plaintiff's Ex 64
Robert Fisher
Official Stenographer

Brainard Avery
Earl B. Barnes
Jay E. Whiting
Geo. O. Castell

669

March 27th, 1930.

Arthur Garfield Hays, Esq.,
43 Exchange Place,
New York City.

Dear Sir:

Claims of U. S. A. on behalf of Crossman & Sielcken in Liquidation and Irving Trust Company against Germany and Z. E. G.

Z. E. G. against Executors of Hermann Sielcken deceased, and Clara Sielcken Schwarz as residuary legatee of estate of Hermann Sielcken.

Theodor Wille against Crossman & Sielcken in Liquidation, and Clara Sielcken Schwarz.

670 *Exhibit W Annexed to Affidavit of Frank C. Sterck*

Referring to our recent conversation with respect to the settlement of the above mentioned claims, we confirm to you that the following is our understanding of the terms of settlement upon which we have agreed:

1. The money and bonds received by Crossman & Sielcken, in Liquidation from the Alien Property Custodian and/or Treasurer of the United States, in payment of the decree for $716,160.37 of the United States District Court for the Southern District of New York, dated December 30, 1929, are to be forthwith deposited
671 in a bank in this city, to be selected by you and ourselves, in the joint names of Brainard Avery and Arthur Garfield Hays and to remain there pending consummation of the settlement herein described.

We are informed by the Alien Property Custodian that the fund to the credit of this trust amounted, on March 22, 1930, to the sum of $786,056.86, made up as follows:

Government bonds	$475,200.00
Cash	133,279.83
Income interest	177,577.03
672 Total	$786,056.86

We are further informed that there are no claims filed against the fund except the claim represented by said decree and one claim for $200.

2. The claim of Z. E. G. against the executors of Hermann Sielcken deceased and Clara Sielcken Schwarz as residuary legatee of his estate, arising out of the indemnity agreement dated August 31, 1918, is to be settled by payment to you, as attorney for Z. E. G., of one-half of the moneys and/or bonds received from the Alien Property Custodian and/or Treasurer of the United States, in payment of the principal of said decree with interest thereon accumulated from December 30, 1929 to the date of payment, together with one-half of any interest that may accumulate or be paid

thereon during the time said bonds and/or moneys are on deposit in said bank in the joint names of Brainard Avery and Arthur Garfield Hays as hereinbefore provided.

3. You are to produce and deliver to us four general releases duly executed by Z. E. G. and running to the following persons:

(a) To Estate of Georg Georgius, Estate of Gustav Diederichsen, Carl Isenberg and Richard Isenberg, as executors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917. 674

(b) To Clara Sielcken Schwarz as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(c) To Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(d) To John S. Sorenson, as surviving and liquidating partner of the firm of Crossman & Sielcken.

4. We are to procure and deliver to you the following releases, duly executed by the parties signing the same, and running to Z. E. G.: 675

(a) A general release from Clara Sielcken Schwarz as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(b) A general release from Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(c) A general release from John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken.

(d) A general release from Carl Isenberg and Richard Isenberg as executors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

676 *Exhibit W Annexed to Affidavit of Frank C. Sterck*

5. The claim of Theodore Wille against Crossman & Sielcken in Liquidation and against Clara Sielcken Schwarz is to be settled by payment to you or your nominee for account of Theodor Wille, of the sum of $50,000 in cash of our clients share of the moneys and/or bonds received from the Alien Property Custodian and/or Treasurer of the United States, in payment of the decree dated December 30, 1929, hereinbefore referred to.

6. In connection with the settlement of the Wille claim, you are to procure and deliver to us four general releases duly executed by the firm of Theodor Wille and running to the following persons:

677

(a) To Estate of Georg Georgius, Estate of Gustav Diederichsen, Carl Isenberg and Richard Isenberg, as executors under the codicil of the Last Will and Testament of Hermann Sielcken deceased, dated February 18, 1917.

(b) To Clara Sielcken Schwarz, individually and as sole beneficiary of the residuary estate of Hermann Sielcken, deceased.

678 (c) To Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(d) To John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken.

7. In connection with the settlement of the Wille claim, we are to procure and deliver to you the following releases, duly executed by the parties signing the same, and running to Theodor Wille:

(a) A general release from Clara Sielcken Schwarz, individually and as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(b) A general release from Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased. Said release shall also specifically release Theodor Wille

of and from any and all claims of the Columbia Trust Company (now Irving Trust Company) more particularly set forth in the memorial or memorials for claim now pending before the Mixed Claims Commission, List No. 6207, Docket No. 8304.

(c) A general release from John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken. Said release shall also specifically release Theodor Wille of and from any and all claims of John S. Sorenson more particularly set forth in the memorial or memorials for claim now pending before the Mixed Claims Commission, List No. 6207, Docket No. 8304. 680

(d) A general release from Carl Isenberg and Richard Isenberg as executors of the codicil to the Last Will and Testament of Hermann Sielcken deceased, dated February 18, 1917.

8. The payments to be made, and the exchange of releases hereinbefore provided for are conditioned upon an award being entered in favor of the United States of America on behalf of Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased, and John S. Sorenson and Thorleif S. B. Nielsen as surviving partners of Crossman & Sielcken, against Germany and the firm of Theodor Wille, for the sum of $558,827 with interest thereon at the rate of 5% from the 1st day of April, 1918, to the date of payment, in the proceedings now pending before the Mixed Claims Commission United States and Germany, contained in List No. 6207, Docket No. 8304. 681

If the foregoing is in accord with your understanding of the terms of settlement above described, kindly indicate the same.

Very truly yours,

EARL B. BARNES
BRAINARD AVERY

682 *Exhibit W Annexed to Affidavit of Frank C. Sterck*

The foregoing is in accord with my understanding of the terms of settlement hereinabove described:

Arthur Garfield Hays

Zentral Einkaufsgesellschaft
by Arthur Garfield Hays
Atty.-in-Fact.

683 New York, 100 Broadway,
March 27, 1930

To Messrs. Brainard Avery
and Earl B. Barnes.

You are hereby authorized and directed to sign and deliver the foregoing letter.

CLARA SIELCKEN SCHWARZ
by ALEX WENDROTH SIELCKEN
Atty-in-fact.

684 Approved
Irving Trust Company
By Orrin R. Judd,
Vice President
As Executor of the Will
of Hermann Sielcken, dec.

Exhibit X Annexed to Affidavit of Frank C. Sterek. 685

Copy of letter dated April 17, 1930, from O. R. Judd, Vice President of the Irving Trust Company, to Leonard B. Smith, attorney for the Irving Trust Company.

Petr's Ex. 348
1-15-35 L.C.

IRVING TRUST COMPANY, NEW YORK

April 17th, 1930.

686

Leonard B. Smith, Esq.,
128 Broadway,
New York City.

Estate of Hermann Sielcken

Dear Mr. Smith:

On April 10th we wrote you that Mr. Avery had informed us that the Central Hanover Bank & Trust Company had received a sealed package which he believed contained the check and bonds which the government is paying in settlement of the judgment in the suit against Germany and the Z. E. G. The sealed package is held subject to the joint order of Brainard Avery and Arthur Garfield Hays. Mr. Avery informs us that it contains $459,200 face value United States Treasury Notes 3 1/2% due 1930 and Treasury Warrant for $267,481.40 in the name of John S. Sorenson and Thorleif S. B. Nielsen (individually and not as liquidators of Crossman & Sielcken in liquidation). 687

Mr. Avery also tells us that the award by the Mixed Claims Commission in the claim based on the German bond purchase will probably be made next Monday, April 21st, at Washington, in the amount of $558,000, with interest at 5% from April 1st, 1918.

Mr. Avery having made the suggestion that he thought Mr. Hotchkiss would be very helpful in getting the money and securities paid over to the Estate, avoiding the danger of threatened litigation and consequent delay, conferred with Mr. Hotchkiss and on April 10th Mr. Hotchkiss cabled Mrs. Schwarz as follows:

688 *Exhibit X Annexed to Affidavit of Frank C. Sterck*

"For the protection of the late recoveries Avery suggests that he be retained as counsel by Irving as executor and for me to be associated with him in that retainer stop Avery's attitude is that his prior retainer will be fulfilled when all moneys are received and his thought is that they should be paid to Irving without passing through the hands of Sorenson liquidator who is now demanding possession of the funds stop Irving undoubtedly will retain Avery and myself if you
689 request stop Will this interfere with Leonard Smith's relations to you or the Irving stop Confer with Alex cable answer"

to which Mr. Hotchkiss received the following reply from Mrs. Schwarz:

"Hotchkiss join Avery naturally both confer Smith stop Avery's opinion right stop Get Warrens advice also Nielsen if advisable stop Other partner in bad hands stop Leaving for Rome Hotel Russie always cable Alex important business regards to you and all gentlemen"

690 We also received the following cable from Mrs. Schwarz:

"Paris 21 12 0230
LCD Irving Trust 60 Broadway New York City
Judd kindly employ Hotchkiss and Avery for estate please answer Alex regards
CLARA SIELCKEN SCHWARZ"

We have accordingly asked Mr. Avery and Mr. Hotchkiss to represent the estate as counsel in connection with these recoveries and undoubtedly they will shortly confer with you about them.

Very truly yours,

O. R. JUDD
Vice President.

MP
CC to Mr. Avery
Mr. Hotchkiss

COPY

Exhibit Y Annexed to Affidavit of Frank C. Sterck. 691

Letter dated April 24, 1930, from Brainard Avery to Messrs. Crossman & Sielcken in Liquidation, Mr. John S. Sorenson and Mr. Thorleif S. B. Nielsen, Liquidators.

Petr's Ex 346
1-15-35
L.C.

April 24, 1930

Messrs. Crossman & Sielcken in Liquidation,
Mr. John S. Sorenson and 692
Mr. Thorleif S. B. Nielsen, Liquidators.

Gentlemen:

I have to report the proceedings yesterday at the Irving Trust Company, Trust Department, 60 Broadway.

There were present the following:

Crossman & Sielcken in Liquidation, represented by Mr. John S. Sorenson and Mr. Thorleif S. B. Nielsen, liquidators, also by Mr. Avery, counsel for the liquidation;

Estate of Hermann Sielcken, represented by Irving Trust Company, executor (Mr. Orrin R. Judd), also by 693
Mr. Avery and Mr. Charles E. Hotchkiss, counsel for the estate;

Mr. John S. Sorenson, an alleged creditor, represented by Mr. Neilson Olcott and Mr. Weinstein, counsel;

Mr. Thorleif S. B. Nielsen, represented by Mr. Charles L. Woody and Mr. Kellegrew, counsel.

Zentral-Einkaufsgesellschaft, represented by Mr. Arthur Garfield Hays and Mr. Wm. Abramson.

Theodor Wille, represented by Mr. Nielsen, its New York Agent.

Mrs. Clara Sielcken Schwarz, distributee of the Sielcken Estate, and alleged creditor of the liquidation, represented by Mr. Avery and Mr. Hotchkiss, counsel.

Mr. Earl B. Barnes, Mr. George W. Alger and Mr. George O. Castell, represented the lawyers who had conducted the litigation on behalf of Crossman & Sielcken

694 *Exhibit Y Annexed to Affidavit of Frank C. Sterck*

in Liquidation, Irving Trust Company, executor, and Mrs. Clara Sielcken-Schwarz.

Mr. Avery presented to the meeting the following:

(1) Certified copy of decision of German Mixed Claims Commission, whereby "the Government of Germany is obligated to pay to the Government of the United States on behalf of Columbia Trust Company (now Irving Trust Company) as Executor of the
695 Last Will and Testament of Herman Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman and Sielcken, American Nationals, the sum of Five Hundred fifty-eight thousand eight hundred twenty-seven dollars and eighty-five cents ($558,827.85), together with interest thereon at the rate of five per cent per annum from April 1, 1918, to date of payment." $558,827.85

696 (2) U. S. Treasury Notes, 3½%, 1932 par 459,200.00

(3) U. S. Treasury Warrant to order of John S. Sorenson and Thorleif S. B. Nielsen, individually, 267,481.40

(4) Statement of the Alien Property Custodian, dated April 3, 1930, transmitting the funds described in (2) and (3) above, and also to the effect that 21 days accrued interest at 3½% on $459,200 was represented by immature coupons attached to the Treasury Notes, in the amount of 937.53

(5) Photostat letter of settlement, Earl B. Barnes and Brainard Avery to Arthur Garfield Hays, dated March 27, 1930, which settlement had previously been approved by Mrs. Clara Sielcken-

Schwarz and by Irving Trust Company, executor of the will of Hermann Sielcken.

Mr. Hays, representing Zentral-Einkaufsgesellschaft, and Mr. Avery, representing the Sielcken interests, agreed that pursuant to the terms of the letter of March 27, 1930, there had been collected from the Alien Property Custodian and the U. S. Treasury, the following:

U. S. Treasury Notes	$459,200.00
Accrued interest, 3½% 3/15/30/4/5/30 (21 days)	937.53
Cash	267,481.40
Total	$727,618.93

698

of which Zentral-Einkaufsgesellschaft, by its attorney, Mr. Hays, was entitled to one-half.

This one-half was delivered to Mr. Hays, attorney for Z. E. G., by his receiving the following:

2 U. S. Treasury Notes, C-7343 D-7344	$200,000.
2 U. S. Treasury Notes, J-70789 K-70790	20,000.
1 U. S. Treasury Note F-23216	5,000.
4 U. S. Treasury Notes, E-77625 F-77626 G-77627 H-77628	4,000.
2 U. S. Treasury Notes, $100. each	200.
Cash	134,140.70

699

The total amount received by Mr. Hays, as attorney for Z. E. G., is $363,340.70 which is one-half of $726,681.40.

700. *Exhibit Y Annexed to Affidavit of Frank C. Sterck*

The item of 21 days interest on $459,200, amounting to $937.53, was accounted for by the fact that the immature coupons were attached to the $229,200 of Treasury Notes received by Mr. Hays.

Messrs. Sorenson and Nielsen endorsed the U. S. Treasury Warrant drawn to their order, in the amount of $267,481.40, and deposited the same to the order of Crossman & Sielcken in Liquidation with the Irving Trust Company, as bank and not as executor. Checks drawn by the liquidators are to be countersigned by the
701 Irving Trust Co.

The settlement of March 27, 1930 provided, among other things, that the claim of Theodor Wille against Crossman & Sielcken in Liquidation, and/or Estate of Hermann Sielcken, and/or Mrs. Clara Sielcken-Schwarz, and/or Zentral-Einkaufsgesellschaft, should be finally settled by the credit of the sum of $100,000 in favor of Theodor Wille Santos with the J. Henry Schroder Banking Corporation, 46 William Street.

This sum of $100,000 was contributed, $50,000 by Zentral Einkaufsgesellschaft and $50,000 by Crossman & Sielcken in Liquidation.

In addition to the Treasury Notes above mentioned and
702 delivered to Mr. Hays, attorney for Z. E. G. ($229,200 par), Mr. Hays was entitled to receive from Crossman & Sielcken in Liquidation the sum of $134,140.70, but as Z. E. G. was obligated to make the payment of $50,000 to the credit of Theodor Wille & Co. Santos, this $50,000 was deducted from the sum of $134,140.70, and a check was issued by Crossman & Sielcken in Liquidation, signed by John S. Sorenson and Thorleif S. B. Nielsen, liquidators, to the order of Arthur Garfield Hays, attorney, in the sum of $84,040.70.

The $50,000 to be paid to Theodor Wille & Co. Santos by Crossman & Sielcken in Liquidation was paid by check for $100,000, issued by Crossman & Sielcken in Liquidation, John S. Sorenson and Thorleif S. B. Nielsen, liquidators, to order of Arthur Garfield Hays, attorney. This check for $100,000 was composed of $50,000

deducted from and contributed by Z. E. G., as above stated, and $50,000 contributed by Crossman & Sielcken in Liquidation.

The expense of safe-keeping, insurance and transmitting the securities above mentioned from Washington and in New York, amounted to $200, which it was agreed should be evenly divided between Z. E. G. and C. & S. in Liq.

At the close of this transaction, there remains on hand in possession of Crossman & Sielcken in Liquidation, subject to countersignature of Irving Trust Co., the following: 704

U. S. Treasury Notes, 3½%, 1932 with September 15th coupons attached			$230,000.
Cash			83,340.70
Total cash received from APC		$267,481.40	
Amt. paid Wille by Z. E. G.	$50,000.		
Amt. paid Wille by C. & S.	50,000.		
Amt. paid Wille by Hays, Atty. for Z. E. G.	84,040.70		705
Bank charges	100.00	184,140.70	
		$ 83,340.70	
Total U. S. Bonds and Cash, April 24th			$313,340.70

In addition to the foregoing, general releases were exchanged as follows:

General releases from Zentral-Einkaufsgesellschaft:

(a) To Estate of Georg Georgius, Estate of Gustav Diederichsen, Carl Isenberg and Richard Isenberg, as executors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

706 *Exhibit Y Annexed to Affidavit of Frank C. Sterck*

(b) To Clara Sielcken Schwarz as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(c) To Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(d) To John S. Sorenson, as surviving and liquidating partner of the Firm of Crossman & Sielcken.

707 General releases running to Zentral-Einkaufsgesellschaft:

(a) A general release from Clara Sielcken Schwarz as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(b) A general release from Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(c) A general release from John S. Sorenson as surviving and liquidating partner of the firm of
708 Crossman & Sielcken.

(d) A general release from Carl Isenberg and Richard Isenberg as executors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

General releases from Theodor Wille:

(a) To Estate of Georg Georgius, Estate of Gustav Diederichsen, Carl Isenberg and Richard Isenberg, as executors under the codicil of the Last Will and Testament of Hermann Sielcken deceased, dated February, 18, 1917.

(b) To Clara Sielcken Schwarz, individually and as sole beneficiary of the residuary estate of Hermann Sielcken, deceased.

(c) To Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(d) To John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken.

General releases to Theodor Wille:

(a) A general release from Clara Sielcken Schwarz, individually and as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(b) A general release from Columbia Trust 710
Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased. Said release shall also specifically release Theodor Wille of and from any and all claims of the Columbia Trust Company (now Irving Trust Company) more particularly set forth in the memorial or memorials for claim now pending before the Mixed Claims Commission, List No. 6207, Docket No. 8304.

(c) A general release from John S. Sorenson as surviving and liquidating partner of the firm of 711
Crossman & Sielcken. Said release shall also specifically release Theodor Wille of and from any and all claims of John S. Sorenson more particularly set forth in the memorial or memorials for claim now pending before the Mixed Claims Commission, List No. 6207, Docket No. 8304.

(d) A general release from Carl Isenberg and Richard Isenberg as executors of the codicil to the Last Will and Testament of Hermann Sielcken deceased, dated February 18, 1917.

A/B

Very truly yours,

BRAINARD AVERY

712 **Exhibit Z Annexed to Affidavit of Frank C. Sterck.**

Judgment entered in the New York Supreme Court for the County of New York on the 11th day of November, 1933, upon the report of Referee Henry F. Wolff, in an action brought by the Chase National Bank of the City of New York, as Ancilliary Executor of the Last Will and Testament of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, Irving Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, Clara Sielcken Schwarz, and others.

713 NEW YORK SUPREME COURT

COUNTY OF NEW YORK

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Ancilliary Executor of the Last Will and Testament of Thorleif S. B. Nielsen, deceased,

Plaintiff,

against

JOHN S. SORENSON, IRVING TRUST COMPANY, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, CLARA SIELCKEN-SCHWARZ, GEORGE U. KIRKPATRICK, JAMES W. SMITH, TERI-JOHN WEITLING, JOHN F. BUDELMAN, MAURICE J. ELFENBEIN, and all other persons who have or who claim to have any interest whatever in the assets of CROSSMAN & SIELCKEN, which persons, if any there be, and their names are unknown to plaintiff,

714

Defendants.

The issues in the above entitled action having been duly referred to Henry F. Wolff, Esq., an attorney at law of the Borough of Manhattan, New York City, as referee, to hear and determine, by an order granted and entered herein on the 18th day of December, 1931 on the consent of all the parties who have appeared herein and it having been further provided by the terms of said order that in the event an accounting was decreed be-

tween any of the parties hereto, the said referee should take and state the account so far as possible between the parties who have appeared and in his report award, subject to certain limitations in said order contained, the final judgment to be entered and said referee having taken his oath of office and the issues in the cause having been regularly brought on for trial before said referee at his office, No. 52 William Street in said Borough and City on the 23rd day of December, 1931 and on various dates thereafter at said referee's office, No. 90 Broad Street, in said Borough and City and the 716
plaintiff having appeared by Chadbourne, Stanchfield & Levy, its attorneys, and the defendant, John S. Sorenson, by Tibbetts, Lewis & Rand, his attorneys, the defendant Irving Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, Deceased by Leonard B. Smith its attorney and Selden Bacon its counsel, and the defendant, Clara Sielcken-Schwarz by Avery & Whiting, her attorneys and the defendants George U. Kirkpatrick, James W. Smith, Terijon Weitling, John F. Budelman and Maurice J. Elfenbein not having been served with the summons and not having appeared herein and one Frank H. Stewart (mentioned in the answer 717
of said Irving Trust Company, as Executor as aforesaid) not having been made a party defendant herein and said order having further provided that the trial of the rights of the parties to this action who have appeared herein might nevertheless proceed and the referee having heard the allegations and proofs of the parties so appearing and after due deliberation, having duly made and filed his decision on the 29th day of June 1933, containing a statement of the facts found and his conclusions of law thereon, and directing judgment as hereinafter stated, and the costs of the defendant Irving Trust Company as Executor of the Last Will and Testament of Hermann Sielcken, Deceased and of the defendant Clara Sielcken-Schwarz having been duly taxed and adjusted at the sums of $1090 60/100 and $1091 04/100 respectively:

718 *Exhibit Z Annexed to Affidavit of Frank C. Steck*

NOW, on motion of Avery & Whiting, attorneys for said defendant, Clara Sielcken-Schwarz, it is

ADJUDGED that upon the death of said Hermann Sielcken on October 8th, 1917, by virtue of the terms of a certain partnership agreement dated June 2nd, 1913 (a copy of which is attached to the complaint herein) between said Sielcken and said John S. Sorenson and said Thorleif S. B. Nielsen and by virtue of the terms of said Sielcken's will dated March 23rd, 1914, and admitted to probate by the Surrogate's Court of the County of New York on the 26th day of January 1918, the sole right to liquidate the partnership assets and property of the firm of Crossman & Sielcken was vested in the executor named in said will, now said defendant Irving Trust Company, and under the terms of said instruments no other person was lawfully entitled to be such liquidator. It is further

719

ADJUDGED that neither the plaintiff's testator, Thorleif S. B. Neilsen nor said defendant John S. Sorenson is now or at any time since the dissolution of said firm of Crossman & Sielcken by the said death of said Hermann Sielcken on October 8th, 1917 has been a liquidating partner thereof; that neither the plaintiff, as executor of the last will and testament of said Thorleif S. B. Nielsen, deceased, nor said defendant, John S. Sorenson is entitled to any payment in addition to that heretofore received for their respective shares or interest in the business, profits and assets of said firm; that neither of them is entitled to compensation in addition to that heretofore paid for services in connection with the liquidation and settlement of the business and affairs of said firm, and that neither of them is entitled to file an account herein. It is further

720

ADJUDGED that said Irving Trust Company, as executor of the last will and testament of Hermann Sielcken, deceased is entitled to the sole custody and possession of all the property and assets of every kind of said firm of Crossman & Sielcken, in liquidation. It is further

ADJUDGED that said Irving Trust Company, as executor as aforesaid, is entitled to have delivered to it by the plaintiff herein and said defendant, John S. Sorenson, all property of every kind and description belonging to said firm of Crossman & Sielcken in liquidation, and now or hereafter, in whole or in part, in their possession or control or in the possession or control of either one of them, including all monies and securities heretofore received and deposited with said Irving Trust Company as bank and not as executor, to the credit of the special account known as Crossman & Sielcken in liqui- 722
dation, and to have signed, executed and delivered by said Sorenson and by said plaintiff as executor of the will of said Nielsen, and each of them, from time to time, such instruments in writing as may be necessary to effectuate such transfer and delivery: It is further

ADJUDGED that the plaintiff herein and said John S. Sorenson have no right, claim, title or interest in and to such balance as may now remain unpaid of a certain compromise award granted by the Mixed Claims Commission, United States and Germany in a certain proceeding (known by the docket number 8304 and by the list number 6207) entitled "United States of America
on behalf of Columbia Trust Company (now the Amer- 723
ican Exchange Irving Trust Company), as executor of the last will and testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken, vs. Germany, and the firm of Theodor Wille, impleaded," and said Irving Trust Company, as executor as aforesaid, is entitled to have any unpaid balance of said award paid to it by proper instruments in writing drawn to its sole order as executor of the last will and testament of Hermann Sielcken, deceased, without interference on the part of the plaintiff herein or said John S. Sorenson or either one of them. It is further

ADJUDGED that said defendant Irving Trust Company, as executor of the last will and testament of Her-

724 *Exhibit Z Annexed to Affidavit of Frank C. Sterck*

mann Sielcken, deceased, has the sole right to collect any further warrants of the United States Treasury issued in payment of said award and made payable to the joint order of said Irving Trust Company as executor of the last will and testament of Hermann Sielcken, deceased, Thorleif S. B. Nielsen and John S. Sorenson, and for this purpose to have the same promptly endorsed over to it by the plaintiff as executor as aforesaid, and its successor, if any, and by the defendant Sorenson, or in case of his death, by his personal representative or
725 representatives. It is further

Adjudged that the settlement with said John S. Sorenson and with said Thorleif S. B. Nielsen arrived at by said firm of Crossman & Sielcken in liquidation on or about the 23rd day of December, 1917 was intended by the parties thereto to be and was in fact, a complete and final settlement by virtue of which the plaintiff's testator and said Sorenson each accepted the sum then paid to him in full settlement of all claims to the assets of said firm of Crossman & Sielcken and the profits of said partnership, whether realized or to be realized in the future; that said settlements with plaintiff's testa-
726 tor and with said Sorenson were as to each of them a full accord and satisfaction of all of their respective claims to share in the assets and profits of said firm; that said settlements constitute a bar to any claim by either of them to share in the recovery by said firm of Crossman & Sielcken for the Copenhagen cargoes seized by the British Naval authorities and under the compromise award granted by said Mixed Claims Commission in said proceeding known by the docket number 8304 and by the list number 6207, and entitled "United States of America on behalf of Columbia Trust Company (now the American Exchange Irving Trust Company) as executor of the last will and testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Cross-

man & Sielcken, vs. Germany, and the firm of Theodor Wille, impleaded." It is further

ADJUDGED that the defendant Sorenson is not entitled to account as liquidating partner of said firm of Crossman & Sielcken. It is further

ADJUDGED that the complaint herein be and the same hereby is dismissed on the merits as to the defendant Irving Trust Company, as executor of the last will and testament of Hermann Sielcken, deceased, and as to the defendant, Clara Sielcken-Schwarz, with costs to each of them, and that said defendant Irving Trust 728
Company, as executor as aforesaid, recover of the plaintiff herein, the sum of $1090 60/100 Dollars, its costs as taxed, and that the said defendant, Clara Sielcken-Schwarz, recover of said plaintiff the sum of $1091 04/100 Dollars, her costs as taxed. It is further

ADJUDGED that the first and second counterclaims of said defendant Sorenson, contained in his amended reply to the answer herein of the defendant Irving Trust Company as executor as aforesaid, be and they hereby are dismissed as to said defendant Irving Trust Company as such executor and as to said defendant Clara Sielcken-Schwarz. It is further 729

ADJUDGED that said defendant Irving Trust Company, as executor as aforesaid, is entitled to account herein and it is hereby ordered and directed to prepare and file with the said Henry F. Wolff referee herein within thirty days after the service upon it of a copy of this judgment with notice of entry, an account of all its acts and transactions as liquidator of said firm of Crossman & Sielcken, in liquidation, not embraced in the accounting proceeding heretofore instituted by it in the Surrogates' Court for the County of New York, entitled "In the Matter of the Judicial Settlement of the Account of the Columbia Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, de-

730 *Exhibit Z Annexed to Affidavit of Frank C. Sterck*

ceased," in which a decree was entered in said Court on the 8th day of July, 1921. It is further

ADJUDGED that said defendant, Irving Trust Company, as executor as aforesaid, and said defendant, Clara Sielcken-Schwarz may respectively from time to time, apply for further relief at the foot of this judgment, not inconsistent herewith.

Judgment this 11th day of November, 1933.

DANIEL E FINN
Clerk

731

The foregoing judgment is hereby approved as to form.

Dated: New York, November 8th 1933

HENRY F. WOLFF
Referee.

3.80 (2)
11/15/33
B. G.

732

Exhibit Z Annexed to Affidavit of Frank C. Sterck 733

NEW YORK SUPREME COURT

COUNTY OF NEW YORK

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Ancillary Executor of the Last Will and Testament of Thorleif S. B. Nielsen, deceased,

Plaintiff,

against

734

JOHN S. SORENSON, IRVING TRUST COMPANY, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, CLARA SIELCKEN-SCHWARZ, *et al.*,

Defendants.

Judgment on Report of Referee.

Filed November 11, 1933

At 11 o'clock & 15 M AM

735

AVERY & WHITING
Attorneys for Defendant
Clara Sielcken-Schwarz,
100 Broadway
Borough of Manhattan
New York City

28047/31 (513) 2 aa

xx

44323

736 *Exhibit Z Annexed to Affidavit of Frank C. Sterck*

Due and timely service of a copy of the within
is hereby admitted this day of 193 .

Attorney for

Please take notice that
of which the within is a copy was duly entered and filed in the office of the Clerk of the County of
737 on 193 .

AVERY & WHITING
Attorneys for
100 Broadway
Borough of Manhattan
New York City

To

Attorney for

738 Please take notice that a
of which the within is a copy will be presented for settlemen and signature to the Hon.
a Justice of the within named Court, at
in the Court House of said Court, in the Borough of City of New York, on the day of 193 at o'clock in the noon of said day.

Dated, New York, 193 .

AVERY & WHITING
Attorneys for
100 Broadway
Borough of Manhattan
New York City

To

Attorney for

Exhibit AA Annexed to Affidavit of Frank C. Sterck. 739

Final Judgment dated November 8, 1937 upon the judgment entered in the New York Supreme Court for the County of New York on November 11, 1933, in the action brought by the Chase National Bank of the City of New York, as Ancillary Executor of the Last Will and Testament of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, Irving Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, Clara Sielcken Schwarz, and others.

SUPREME COURT 740

NEW YORK COUNTY

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Ancillary Executor of the Last Will and Testament of Thorleif S. B. Nielsen, deceased,
Plaintiff,

against

JOHN S. SORENSON, IRVING TRUST COMPANY, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, CLARA SIELCKEN-SCHWARZ, GEORGE U. KIRKPATRICK, JAMES W. SMITH, TERIJON WEITLING, JOHN F. BUDELMAN, MAURICE J. ELFENBEIN, and all other persons who have or who claim to have any interest whatever in the assets of CROSSMAN & SIELCKEN, which persons, if any there be, and their names are unknown to plaintiff,
Defendants.

Index No. 28047-1931

Final Judgment 741

Upon the judgment herein entered on the 11th day of November, 1933 and pursuant to the order of this court in this matter, of date the 1st day of ~~October~~ *November* 1937,

NOW, on motion of Leonard B. Smith, attorney for the defendant Irving Trust Company as executor of the

742 *Exhibit AA Annexed to Affidavit of Frank C. Sterck*

last will and testament of Hermann Sielcken, deceased, it is

ADJUDGED that the account of the defendant Irving Trust Company as Executor of the last Will and Testament of Hermann Sielcken, deceased, dated December 11th, 1933, (of all its acts and transactions as liquidator of the firm of Crossman & Sielcken in liquidation not embraced in the accounting proceeding heretofore instituted by it in the Surrogate's Court for the County of New York, entitled "In the Matter of the Judicial
743 Settlement of the Account of the Columbia Trust Company as Executor of the last Will and Testament of Hermann Sielcken, deceased," in which accounting proceeding a decree was entered in said Surrogate's Court on the 8th day of July, 1921, down to and including the 9th day of December, 1933), be and the same hereby is in all respects approved and confirmed, without costs; and it is further

ADJUDGED THAT THE DEFENDANT Irving Trust Company as Executor of the last Will and Testament of Hermann Sielcken, deceased, has duly accounted for all its acts and transactions as liquidator of the firm
744 of Crossman & Sielcken in liquidation not embraced in the accounting proceeding heretofore instituted by it in the Surrogate's Court for the County of New York, entitled "In the Matter of the Judicial Settlement of the Account of the Columbia Trust Company as Executor of the last Will and Testament of Hermann Sielcken, deceased," in which a decree was entered on the 8th day of July, 1921, down to and including the 9th day of December, 1933, and that the state and condition of said account as of the 9th day of December, 1933, are set forth in the following summary thereof now finally allowed, to wit:

Said defendant as such liquidator is charged with:

Schedules 1, 2 and 2 (a) of Exhibit A, annexed to said account	$4,489,754.99

Exhibit AA Annexed to Affidavit of Frank C. Sterck 745

Schedules 1 and 2 of Exhibit E, annexed to said account		2,562,039.92
Schedules 1 and 2 of Exhibit G, annexed to said account		443,165.43
Receipts after March 18, 1927:		
Cash	$896,264.52	
United States Treasury Notes	230,000.00	1,126,264.52
		$8,621,224.86
and Unpaid Balance of Award of Mixed Claims Commission—United States and Germany		Value unknown

746

Said defendant as such liquidator is credited with:

Schedules 1, 2 and 2 (a) of Exhibit A, annexed to said account	$4,489,754.99	
Schedules 1 and 2 of Exhibit E, annexed to said account	2,562,039.92	
Schedules 1 and 2 of Exhibit G, annexed to said account	443,165.43	

747

Disbursements after March 18, 1927:			
Cash	$786,166.46		
United States Treasury Notes	230,000.00		
		1,016,166.46	$8,511,126.80
Leaving a balance on hand of			$ 110,098.06
and said unpaid balance of Award of Mixed Claims Commission—United States and Germany			Value unknown

748 *Exhibit AA Annexed to Affidavit of Frank C. Sterck*

And it is further

ADJUDGED that the defendant Irving Trust Company as such liquidator, in its capacity as executor of said Hermann Sielcken, deceased, was authorized to transfer to itself, as such executor, the sum of $230,000 of United States Treasury notes; to pay to itself, as such executor, the cash sum of $300,357.72; to pay to itself, as such executor, the stated balance of $110,098.06, and to transfer to itself, as such executor, the unpaid balance, of unknown value, of the Award of Mixed Claims
749 Commission—United States and Germany—all as shown in said account; and it is further

ADJUDGED that, upon such transfer to itself, as such executor, of the said sum of $230,000 of United States Treasury notes; the payment to itself, as such executor, of the said respective sums of $300,357.72 and of $110,098.06, and the transfer to itself, as such executor, of the said balance, of unknown value, of said Award of Mixed Claims Commission—United States and Germany—the Irving Trust Company be and it hereby is discharged of and from all liability for all of its acts and transactions as liquidator of the firm of Crossman
750 & Sielcken as stated in said account, and charged with the said sum of $230,000 of United States Treasury Notes; the said respective sums of $300,357.72 and of $110,098.06, and the unpaid balance of such Award, as such executor, to be accounted for by it, as such executor, as of the date of receipt thereof respectively, in due course, before the Surrogate for New York County or other tribunal having jurisdiction.

Dated November 8, 1937

ALBERT MARINELLI
Clerk

Certified copy Issued
Fee paid 1.20
Date 11/8/37
County Clerk N. Y. Co.
By M.
Judg. 11 page 346.

28047-1931

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Ancillary Executor of the Last Will and Testament of THORLEIF S. B. NIELSEN, deceased,

Plaintiff,

against 752

JOHN S. SORENSEN, IRVING TRUST COMPANY, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, CLARA SIELCKEN-SCHWARZ, GEORGE U. KIRKPATRICK, JAMES W. SMITH, TERIJON WEITLING, JOHN F. BUDELMAN, MAURICE J. ELFENBEIN, and all other persons who have, or who claim to have, any interest whatever in the assets of CROSSMAN & SIELCKEN, which persons, if any there be, and their names are unknown to plaintiff, 753

Defendants.

Final Judgment.

Filed November 8, 1937 at 2 o'clock & 20 m P. M.

LEONARD B. SMITH,
Attorney for Defendant Irving Trust Company as Executor of the Last Will and Testament of Hermann Sielcken, deceased,
230 Park Avenue,
New York City.

Fee Paid $4.50
Stub No. 15724
Nov 8 1937
County Clerk N. Y. Co.
By: G
Cashier

Judg 11 Page 347

Recorded
Photostat Div.
Nov 1937
By.....

754 **Exhibit BB Annexed to Affidavit of Frank C. Sterck.**

Release of Thorleif S. B. Nielsen to the firm of Crossman & Sielcken.

Respondent Irving Trust Co. Exhibit No. 10280.

5/31/35 L. C.

GENERAL RELEASE.

755 To All to Whom These Presents Shall Come or May Concern,

Greeting: Know Ye, That I, Thorleif S. B. Nielsen, of Hackensack, N. J., member of the firm of Crossman & Sielcken, now in liquidation, for and in consideration of the sum of One hundred and Twenty Thousand Seven hundred Twenty-four & 28/100 dollars ($120724.28), lawful money of the United States of America to me in hand paid by the Firm of Crossman & Sielcken in Liquidation, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and by these presents do for myself, my heirs, executors and administrators, remise, release and forever discharge the said
756 Firm of Crossman & Sielcken, its successors and assigns, and the members thereof and their several heirs, executors and administrators, of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against them or any of them, I ever had, now have or which my heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents.

In consideration of the receipt of the afore-mentioned payment, I hereby agree that, should any amount be

awarded to me, individually, by any Prize Court or otherwise, on account of goods shipped during the year 1915 and seized by the British Naval Authorities, I will pay all such amounts forthwith to the Columbia Trust Co. as Executor of the Estate of Hermann Sielcken, Deceased.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 22nd day of December in the year one thousand nine hundred seventeen.

THORLEIF S. B. NIELSEN

Sealed and delivered in the presence of 758
BERNARD ROSENTHAL

State of New York
County of New York, ss:

On this 22nd day of December, 1917 before me personally appeared Thorleif S. B. Nielsen, to me known, and known to me to be the same person described in and who executed the within instrument and he acknowledged to me that he executed the same.

BERNARD ROSENTHAL
Commissioner of Deeds, City of New York,
Residing in Kings County. 759
Certificates Filed in New York and Kings Counties.
N. Y. County Clerks No. 226 Register No. .....
My Commission Expires Oct. 17, 1918

(Seal.)

760 **Exhibit CC Annexed to Affidavit of Frank C. Sterck.**

Release of John S. Sorenson to the firm of Crossman & Sielcken.

Respondent Irving Trust Co. Exhibit No. 10279.

5/31/35 L. C.

GENERAL RELEASE.

761 To All to Whom These Presents Shall Come or May Concern,

Greeting: Know Ye, That I, John S. Sorenson, member of the firm of Crossman & Sielcken, now in liquidation, for and in consideration of the sum of One hundred and Twenty Thousand Seven hundred Twenty-four & 28/100 dollars ($120724.28), lawful money of the United States of America to me in hand paid by the Firm of Crossman & Sielcken in Liquidation, the receipt whereof is hereby acknowledged, have remised, released, and forever discharged, and by these presents do for myself, my heirs, executors and administrators, remise, release and forever
762 discharge the said Firm of Crossman & Sielcken, its successors and assigns, and the members thereof and their several heirs, executors and administrators, of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against them or any of them, I ever had, now have or which my heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents.

In consideration of the receipt of the afore-mentioned payment, I hereby agree that, should any amount be awarded to me, individually, by any Prize Court or otherwise, on account of goods shipped during the year 1915

and seized by the British Naval Authorities, I will pay all such amounts forthwith to the Columbia Trust Co. as Executors of the Estate of Hermann Sielcken, Deceased.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 22nd day of December in the year one thousand nine hundred seventeen.

JOHN S. SORENSON

Sealed and delivered in the presence of
BERNARD ROSENTHAL

764

State of New York,
County of New York, ss:

On this 22nd day of December 1917 before me personally appeared John S. Sorenson, to me known, and known to me to be the same person described in and who executed the within instrument and he acknowledged to me that he executed the same.

BERNARD ROSENTHAL
Commissioner of Deeds, City of New York,
Residing in Kings County.
Certificates Filed in New York and Kings Counties.
N. Y. County Clerks No. 226 Register No..... 765
My Commission Expires Oct. 17, 1918

(Seal.)

766 **Exhibit DD Annexed to Affidavit of Frank C. Sterck.**

Opinion of Surrogate Foley, handed down April 21, 1938, on application of the Attorney-General to intervene in the Judicial Proceedings of the Estate of Hermann Sielcken, deceased.

(Copy.)

(FOLEY, S.)

767 Filed April 21, 1938.

Estate of Hermann Sielcken.

The Attorney-General of the United States as successor to the Alien Property Custodian moves for leave to intervene in the pending accounting proceeding of the Irving Trust Company as executor of Hermann Sielcken. In addition, he asks leave to file objections to the account and prays for other relief incidental to the preservation of the rights of the Federal Government.

The application is granted in its entirety. The present
768 action of the Attorney-General appears to have arisen out of the evidence developed in the very bitter litigation in a proceeding to vacate prior decrees of this court judicially settling the accounts of the executor. The widow of the decedent sought to reopen these decrees as a basis of attack upon the conduct of the executor. Her application was denied in my decision in Matter of Sielcken (162 Misc. 54). Hermann Sielcken died in Germany in 1917 after the entrance of the United States into the World War. He had lived there for some years, although he apparently retained his American citizenship. His wife was the chief beneficiary and residuary legatee under his will. She had sojourned with her husband in Germany, was with him at the time of his death and came to America some months after the war terminated.

Pursuant to the powers conferred by the Trading With the Enemy Act and under the Executive Orders of the

President, the Alien Property Custodian as his delegate several years ago made demands for the payment of certain individual property interests of Sielcken, his interest in the partnership of Crossman & Sielcken, wholesale coffee merchants, the interest of his wife in the estate of her husband and the further interest in such part of the property which might be transmitted from this country to Germany to the German executors appointed in the will. The provisions of the Trading With the Enemy Act applied not only to enemy aliens, but to citizens of the United States resident in enemy countries (Sec. 2, 770
40 U. S. Stat. at Large 411; Chap. 106 as amended; Noble v. Great American Ins. Co., 200 App. Div. 773). In 1921, Attorney-General Daugherty, under his powers, released any interest of the United States Government in the estate generally, or in the legacy of the widow. He also permitted the payment to the estate of certain funds deposited with the Custodian from the partnership assets.

The controversy between the executor and the widow in the proceeding for the vacatur of the decrees appears to have developed evidence as to the citizenship of Sielcken and as to the activities of him and his wife in their loyalty or disloyalty to our government immediately 771
prior and subsequent to the declaration of war on April 6, 1917. These disclosures led to the recent demands made by the Attorney-General of the United States as the successor of the Custodian. On August 25, 1935, general power had been granted to the Attorney-General by an Executive Order of the President to revoke or vacate any order issued in favor of any claimant in pursuance of Section 9 of the Trading With the Enemy Act, which had been made or allowed without authority of law, or as a result of misrepresentations or fraud on the part of the claimant or a representative of the claimant, or by collusion with any officer or employee of the government. Authority to institute suit was granted by that order to the Attorney-General. Further authority was granted "to do any other lawful act, deemed necessary by him, for the purpose of claiming or recovering moneys and property

paid or delivered to any claimant." On January 6, 1938, the Attorney-General of the United States, by a formal instrument revoked the claims previously allowed by Attorney-General Daugherty in 1921 in respect of the estate and of the interest of the decedent in the liquidation of the partnership of Crossman & Sielcken and of the interest of the widow as beneficiary of the estate. By that instrument Attorney-General Cummings also vacated the previous orders directing payment and releasing the property which had been made the subject of demand or seizure. The grounds of his action as stated in the instrument are that the previous allowance of the claims was "without authority of law or as a result of fraud and misrepresentation made by the claimants therein or by their authorized representatives, agents or attorneys."

Counsel for the executor appear to have taken inconsistent and contradictory positions in their brief. On the one hand they state that they have no objection to the intervention of the Attorney-General or to his being permitted to file objections to the present account. On the other hand, they seek, in advance of the filing of the objections, to obtain permission from the Surrogate to litigate in this court the validity of the action of the President in making the Executive Order of 1935 and the validity of the subsequent action of the Attorney-General in revoking the allowances of the claims and the orders permitting the relinquishment or return of the funds to the estate or to the widow. The latter contentions have no place in this court.

In numerous decisions of the United States Supreme Court the status of the Alien Property Custodian and that of the Attorney-General as his successor have been defined and their power over the property or over an interest in property of a person classified as an enemy sustained (Central Union Trust Co. v. Garvin, 254 U. S. 554; Stoehr v. Wallace, 255 U. S. 239; United States v. Chemical Foundation, 272 U. S. 1; Henkels v. Sutherland, 271 U. S. 298; Woodson v. Deutsche, etc., 292 U. S. 449; Cummings v. Deutsche Bank, 300 U. S. 115).

In our own state there is similar finality in the recognition of the right of the Federal Government to demand and seize through the Executive Order of the President, supplemented by the demand of the Custodian, the property of enemies or those defined to be enemies by the Federal statutes (Miller v. Lautenburg, 239 N. Y. 132; Matter of Bendit, 214 App. Div. 446; Noble v. Great American Ins. Co., 200 App. Div. 773; Rothbarth v. Herzfeld, 179 App. Div. 865, aff'd 223 N. Y. 578; Matter of Schaefer, 112 Misc. 303).

The status of the Custodian has likewise been definitely fixed by our courts. The mere demand of the delegate of 776
the President made pursuant to the Trading With the Enemy Act is sufficient to give him a status as a person interested in an estate with complete possession of the legal and equitable rights of the enemy beneficiary. "The determination by the delegate of the President that the property is enemy owned has the same force as a like determination by the President himself. The determination, though not conclusive, has prima facie a validity that suffices to sustain a transfer of possession" (Cardozo, J., in Miller v. Lautenburg, *supra,* p. 136). If the determination is challenged as erroneous it may be contested and restitution sought by claim and suit in the appropriate Fed- 777
eral Court under the provisions of the Trading With the Enemy Act and its amendments (Central Union Trust Co. v. Garvan, *supra,* p. 567; Cummings v. Deutsche Bank, 300 U. S. 115).

While it is not material here, because of my determination that this court has no jurisdiction to inquire into the legality of the order of the Attorney-General revoking the prior allowance of claims, it should be noted that the power of the Attorney-General to so act was sustained by the United States Court of Appeals for the District of Columbia in Cummings v. Societe Suisse, 85 Fed. Rep. 2d 287, decided June 8th, 1936.

To clarify, therefore, the issues, present and prospective, in the pending proceeding I hold that this court may not inquire into (a) the validity of the Executive Order of the President or the legality of the demand of the Alien

778 *Exhibit DD Annexed to Affidavit of Frank C. Sterck*

Property Custodian or his successor, the Attorney-General, or (b) the circumstances which led the Alien Property Custodian or his successor to designate the person as an enemy, or (c) the nature of that person's conduct and whether treasonable or otherwise, or (d) the question raised by counsel for the executor as to whether fraud or misrepresentation actually led to the relinquishment by the Attorney-General in 1921 of the rights of the Government in the estate or in its assets or in the interest of Mrs. Sielcken as a residuary legatee. If the executor or the widow seeks to attack the legality of any of the
779 acts of which they now complain, they must resort to a Federal forum (People v. Hillman, 246 N. Y. 467, 481; Matter of Smathers, 249 App. Div. 523).

The Attorney-General will be granted until May 23rd, 1938, to serve and file objections to the account. The contentions of counsel for the executor as to the possible forms such objections may take, must be disregarded. It would be futile to speculate on the nature of these objections until they are filed. One of these contentions relates to the rights of the assignees of the widow of the funds on deposit with the Chase National Bank under the so-called letter agreement between the executor and the
780 bank dated February 3rd, 1931, by which certain funds of the estate were paid out by the executor for the account of the widow, but with provision for safekeeping and return to the corporate executor for reimbursement by it for estate obligations. If that question be raised by the objections, the rights of the assignees to share in the fund, as alleged innocent transferees, will not be tried and determined by the Surrogate. The assignees will have to proceed as claimants against the Attorney-General under Section 9 (a) of the Trading With the Enemy Act and if their claims are disallowed, they must resort to the form of action, authorized by the section, in the proper Federal Court (Cummings v. Deutsche Bank, *supra*, p. 122).

I specifically hold, however, that the funds or securities in the possession of the Chase National Bank are within the jurisdiction of this court and may be made

the subject of a provision in the decree settling the account, of a direction for repayment if a legal basis for such a direction be established. Under the provisions of Section 267 of the Surrogate's Court Act if "any person interested in an estate has received estate assets in excess of the amount determined on the settlement of the account to be lawfully due him the Surrogate shall have power to direct in the decree repayment by him of such excess to the representative of the estate or otherwise as justice may require * * *."

It should be noted that the Attorney-General in his brief specifically disclaims any attempt to question the jurisdiction of this court to fix the reasonable administration expenses allowable by the Surrogate. 782

The further contention of counsel for the executor that the decrees of this court of July 7th, 1921, and July 11th, 1922, are generally conclusive upon the Alien Property Custodian because of his participation in the accounting proceedings terminated by those decrees, is likewise overruled. They constitute a special bar upon any question which might have been raised as to items of the accounts but they do not constitute an estoppel and are not *res adjudicata* as against the present claim asserted by the Attorney-General that the release and relinquishment of the rights of the Government were procured by the fraud and misrepresentation of the claimants. 783

Submit order on notice accordingly.

784 **Affidavit of John S. Sorenson (Verified June 18, 1938).**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against 785 HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H., Defendants.	Eq. No. 44-28.

State of New York,
County of Kings, ss:

John S. Sorenson, being duly sworn, deposes and says:

I am the surviving partner of the firm of Crossman & Sielcken, and reside at 757 Carroll Street, Brooklyn, New
786 York, and was one of the plaintiffs in the above entitled cause in my said representative capacity.

I make this affidavit in connection with the motion made by the attorney for the United States, for an order vacating the final decree entered in this cause on December 30, 1929.

I neither admit nor deny the statements contained in the moving affidavit, since I have been advised by my counsel, Edward Garfield, Esq., and Robert H. Wrubel, Esq., that I no longer have any pecuniary interest in the above entitled cause for the reasons hereinafter set forth.

When this suit was commenced, I, and the late Thorleif S. B. Nielsen, were advised by our then counsel and believed ourselves to be in law the only persons entitled to liquidate the assets of the firm of Crossman & Sielcken in liquidation, upon the ground that we were the surviving partners. It was for that reason that the above en-

titled proceeding was instituted by us in behalf of said partnership as such surviving partners. Long after the judgment was rendered in this cause, however, it was judicially determined in an action duly instituted in the Supreme Court of the State of New York, New York County, entitled, "The Chase National Bank of the City of New York, as Ancillary Executor of the Last Will and Testament of Thorleif S. B. Nielsen, deceased, Plaintiff, against John S. Sorenson, Irving Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, Clara Sielcken-Schwarz, George U. Kirkpatrick, James W. Smith, Terijohn Weitling, John F. Budelman, Maurice J. Elfenbein, and all other persons who have or who claim to have any interest whatever in the assets of Crossman & Sielcken, which persons, if any there be, and their names are unknown to plaintiff, Defendants," that the sole right to liquidate the assets and property of said partnership was vested in the Irving Trust Company, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and that no other person was lawfully entitled to be such liquidator. It was further determined in said action that neither said Nielsen nor myself was then, or at any other time since the dissolution of the firm of Crossman & Sielcken by the death of said Hermann Sielcken, on October 8, 1917, had been a liquidating partner thereof. The aforesaid determination was incorporated in a judgment entered in the aforesaid action in the office of the Clerk of the County of New York on November 11, 1933, a copy of which is annexed to the moving papers herein, marked Exhibit Z. It was further adjudged by the aforesaid judgment that the said Irving Trust Company as Executor of the Last Will and Testament of Hermann Sielcken, deceased, was entitled to the sole custody and possession of all the property and assets of every kind of said firm of Crossman & Sielcken in liquidation. I never retained any money or property in my individual capacity received by me in satisfaction of the final decree in this cause, and all money and property received by me and Thorleif S. B. Nielsen was received by us as surviving partners of

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790 *Affidavit of John S. Sorenson, Verified June 18, 1938*

the firm of Crossman & Sielcken, and all of the money or property held by me as surviving partner of said firm has been turned over by me to the Irving Trust Company as Executor of the Last Will and Testament of Hermann Sielcken.

In the aforesaid action in the Supreme Court of New York County, I claimed that under the partnership agreement I was entitled to 12 1/2% of such part of the recovery made under the decree of this cause as represented profits, but it was ordered and adjudged in the judgment
791 above referred to that on December 23, 1917, a final settlement had been made by virtue of which I had accepted a sum then paid me in full settlement of all of my claims to the assets of said firm of Crossman & Sielcken and the profits of said partnership, whether realized or to be realized in the future, and further, that said settlement was a full accord and satisfaction of my claim to share in the assets and profits of said firm, and that said settlement constituted a bar to any claim on my part to share in the recovery by said firm of Crossman & Sielcken for the cargoes seized by the British Naval authorities and under the compromise award granted by the Mixed Claims Commission referred to in the moving
792 papers herein.

By reason of the foregoing, I have no pecuniary interest in the above entitled cause.

I call the foregoing facts to the attention of this Court so that this Court may make such determination as it deems proper in the premises.

JOHN S. SORENSON.

Sworn to before me this
18th day of June, 1938.
Harold A. Binig,
Notary Public.
Kings County Clerk's No. 170.
Kings County Reg. No. 295.
Term expires March 30, 1940.

Order to Show Cause of Date June 4, 1938. 793

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.
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Equity No. 44-28.

Upon the affidavit of Vincent L. Banker, verified June 3, 1938, and upon the bill of complaint, the answers of the defendants filed herein in the Office of the Clerk of this Court, the final decree of December 30, 1929, and upon all the pleadings and proceedings heretofore had herein,

Let the Attorney-General of the United States, as successor to the Alien Property Custodian, show cause 795
before this Court at a stated term thereof for the hearing of motions, to be held in Room 506, the U. S. Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 10th day of June, 1938, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered in the above entitled suit (1) vacating, setting aside, cancelling and annulling service on "The Chase National Bank of the City of New York, as Ancillary Administrator of the Estate of Thorleif S. B. Nielsen," of certain motion papers, dated May 18, 1938, served by Lamar Hardy, Esq., United States Attorney for the Southern District of New York, and seeking an order vacating the final decree entered in this suit on December 30, 1929; and (2) bringing into this pro-

796 *Order to Show Cause of Date June 4, 1938*

ceeding indispensable and necessary parties thereto and dismissing the proceeding sought to be instituted by said motion as against said "The Chase National Bank of the City of New York, as Ancillary Administrator of the Estate of Thorleif S. B. Nielsen," and for such other further and different relief as may be just and proper; and

Let service of this order to show cause with the affidavit hereto annexed on said United States Attorney on or before the 6th day of June, 1938, be deemed good and sufficient service; and

797 Let the time of "The Chase National Bank of the City of New York, as Ancillary Administrator of the Estate of Thorleif S. B. Nielsen," to file affidavits in answer to said motion papers dated May 18, 1938, be extended until ten (10) days after the final determination of this motion and the entry of an order thereon; and

Let the return day of said motion to vacate the decree of December 30, 1929, be extended until the first motion day following the expiration of said ten-day period after the final determination of this motion and the entry of an order thereon.

Dated, New York, June 4th, 1938.

798 ROBERT P. PATTERSON,
United States District Judge.

Affidavit of Vincent L. Banker, Verified June 3, 1938. 799

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

Equity No. 44-28. 800

State of New York,
County of New York, ss:

Vincent L. Banker, being duly sworn, deposes and says:

I. I am a Vice President of The Chase National Bank of the City of New York and make this affidavit in support of an order to show cause:

(1) To vacate, set aside, cancel and annul service of motion papers on "The Chase National Bank of the City of New York, as Ancillary Administrator of the Estate of Thorleif S. B. Nielsen" (for brevity referred to hereinafter as "Chase Bank," such reference being intended to refer to said bank in its capacity as Ancillary Executor of the Estate of Thorleif S. B. Nielsen), said motion papers being dated May 18, 1938, and seeking "an order vacating the final decree entered in this cause on the 30th day of December, 1929, on the ground that said final decree is void because this Court was without jurisdiction to enter the same" upon the grounds (a) that Chase Bank was not a party to this suit, (b) has not been substituted as a party or in lieu of any party to this suit, (c) that Chase Bank never was appointed or acted as Ancillary Administrator of the Estate of Thorleif S. B. Nielsen; 801

802 *Affidavit of Vincent L. Banker, Verified June 3, 1938*

and (d) that Chase Bank, over three years prior to the service of these motion papers, was fully and finally discharged as Ancillary Executor of the Estate of Thorleif S. B. Nielsen; and

(2) To bring into this proceeding indispensable and necessary parties thereto hereinafter named and after such parties have been brought into this proceeding, to dismiss this proceeding against said The Chase National Bank of the City of New York, as Ancillary Administrator of the Estate of Thorleif S. B. Nielsen.

803 II. The facts and reasons in support of this motion and justifying the relief sought are as follows:

1. The decree of December 30, 1929, sought to be set aside in the above entitled suit was rendered in favor of "John S. Sorenson and Thorleff S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken." It was in this capacity as surviving partners of the partnership of Crossman & Sielcken that these parties appeared, and no other. They did not appear as individuals or seek any recovery as individuals. The recovery sought was a sum of money alleged to be due the partnership of Crossman & Sielcken. Neither The Chase National Bank of
804 the City of New York nor The Chase National Bank of the City of New York, as Ancillary Executor, etc., was a party to said action and at no time thereafter was the Chase Bank ever substituted for Thorleif S. B. Nielsen as a surviving partner of the firm of Crossman & Sielcken, or in any other capacity. The Chase Bank has been at all times and still is a stranger to the above entitled action.

2. On May 19, 1938, papers consisting of over 200 pages, including voluminous exhibits, and addressed to "The Chase National Bank of the City of New York, as Ancillary Administrator of the Estate of Thorleif S. B. Nielsen, 18 Pine Street, New York, N. Y.," and to "John S. Sorenson, Esq., 757 Carroll Street, Brooklyn, N. Y.," were served upon Chase Bank. Apparently, no service was made upon the defendants Frank White, as Treasurer

of the United States, or Zentral Einkaufsgesellschaft, m. b. H. (hereinafter sometimes referred to as Z. E. G.).

3. The only interest of the moving party appears to be derived through the allegation that the Attorney General of the United States is successor in interest to the Alien Property Custodian.

4. Thorleif S. B. Nielsen died on September 9, 1930, a resident of Bergen County, State of New Jersey. His will was duly admitted to probate in the Surrogate's Court of said county on October 2, 1930, and letters testamentary issued by that court to The Chase National Bank of the 806
City of New York. On April 3, 1935, said bank by a decree of said Surrogate's Court was fully discharged as such Executor. Because of the existence of certain assets of the estate within the State of New York, ancillary letters were issued out of the Surrogate's Court, County of New York, to Chase Bank on October 30, 1930. Thereafter Chase Bank served under said letters as Ancillary Executor within the State of New York until December 20, 1934, on which date a decree of the Surrogate's Court of New York County was duly made and entered (by Hon. James A. Delehanty, Surrogate), discharging the Chase Bank individually and as Ancillary Executor of the Last Will and Testament of Thorleif S. B. Nielsen and relieving 807
it of all further responsibilities thereunder and from any and all liability to any person interested therein. Said decree has not been vacated, set aside or modified, and is still in full force and effect.

5. Service of the motion papers herein has, therefore, been made upon Chase Bank over three years and five months after Chase Bank had been discharged as Ancillary Executor of the Nielsen Estate (referred to in the United States Attorney's motion papers as "Ancillary Administrator"), and at a time when it is not acting in such capacity. The Chase Bank was never appointed and never acted as Ancillary Administrator at any time but only as Ancillary Executor in New York and Executor in New Jersey.

808 *Affidavit of Vincent L. Banker, Verified June 3, 1938*

6. I am advised by counsel and believe that the moving affidavit and the exhibits thereto annexed in support of the motion of the United States Attorney, together with the complaint and answer of defendants, Sutherland, White and Z. E. G. show that

Prior to January 23, 1928, a suit was commenced by said Sorenson and said Nielsen "as surviving partners of the firm of Crossman & Sielcken" against the defendants named in the title to this suit, the solicitors for said plaintiffs being Earl V. Barnes and Brainard Avery of
809 the firm of Barnes, Avery & Whiting. On January 23, 1928, the Hon. Charles H. Tuttle, United States Attorney, appeared for defendants Sutherland and White and filed on behalf of such defendants a motion to dismiss and answer, the grounds of said motion to dismiss being (1) that it appeared affirmatively from the bill of complaint that no debt was owing to plaintiffs from any enemy whose property had been transferred or paid to the Alien Property Custodian and/or the Treasurer of the United States and was then held by said Alien Property Custodian and/or the said Treasurer; (2) that it appeared affirmatively that no debt was owing to plaintiffs from Z. E. G.; and (3) that the bill of complaint failed to state
810 facts sufficient to entitle plaintiffs to equitable relief under the provisions of the "Trading with the Enemy Act."

7. Paragraph Eleventh of the bill of complaint in this action alleged:

"ELEVENTH: On or about the 8th day of October, 1917, the said Hermann Sielcken died leaving the plaintiffs the only surviving partners of the said firm of Crossman & Sielcken and said partnership pursuant to Section 61 of the Partnership Law of the State of New York, thereafter continued for the purpose of winding up the affairs and this suit is brought pursuant to said purpose and to enforce the rights given said partnership under Section 9, subdivision (a) of the Trading with the Enemy Act, as amended."

Affidavit of Vincent L. Banker, Verified June 3, 1938 811

8. The answer of the defendants Sutherland and White to the said paragraph stated that they were without knowledge as to the averments of the said paragraph Eleventh and demanded strict proof thereof.

9. The answer of defendant Z. E. G. denied the allegation that the partnership of Crossman & Sielcken continued for the purpose of winding up its affairs and also the allegation that Sorenson and Nielsen were the surviving partners, and affirmatively alleged in paragraph 27 thereof

"that the said Hermann Sielcken owned all the assets 812
of Crossman & Sielcken; that the estate of Hermann Sielcken succeeded to all assets thereof and the plaintiffs are estopped from making the claim set forth herein."

10. The question of the right of Sorenson and Nielsen as surviving partners of Crossman & Sielcken to institute suit and recover thereon was thus squarely put in issue by all the defendants. No motion was made to reopen the decree at the term at which the case was tried or at any other time between 1929 and 1938 or until the present application. No appeal was ever taken from the decree and the time for appeal therefrom expired in 1930. Nor has any motion for a new trial ever been made nor any 813
bill of review ever been filed.

11. I am advised and believe that the claim of the United States upon this application is that said final decree was void because this court was without jurisdiction to enter the same and that the basis for alleged want of jurisdiction is the claim that Sorenson and Nielsen were not proper parties to prosecute the action.

12. In a brief presented to the Mixed Claims Commission by Brainard Avery, one of the attorneys for claimants, in connection with the claim of said plaintiffs against Germany and the firm of Theodor Wille, countersigned by Robert W. Bonynge, Agent of the United States, and H. H. Martin of counsel, being the same Robert W. Bonynge and H. H. Martin referred to in the

814 *Affidavit of Vincent L. Banker, Verified June 3, 1938*

moving papers herein, the argument was advanced that said Sorenson and Nielsen

"in their capacity as (a) liquidators and (b) as surviving partners of the firm of Crossman & Sielcken, are entitled to collect and receive all of the assets and credits of the said firm of Crossman & Sielcken and to procure and recover upon any and all causes of action in favor of said firm at the time of its dissolution."

13. I am advised and believe that the above entitled suit was brought in good faith in the belief that the
815 right of action to recover any sums due the firm of Crossman & Sielcken rested in said plaintiffs as surviving partners of said firm and that this question was duly litigated in this suit.

14. I am advised and believe that the motion papers herein from pages 14 to 22 thereof, inclusive, show that the payment of the sum awarded under the decree herein sought to be reopened and set aside was, with the consent, acquiescence and approval of the American Agent and Department of Justice, made the part of a general settlement of certain other claims that might have been advanced in Germany against the German
816 executors and the ample German estate of Hermann Sielcken, deceased, and not against the firm of Crossman & Sielcken or the American estate of Hermann Sielcken, and that as a result and a part of said general settlement the judgment was satisfied. The moving papers themselves show that the Attorney-General, the very officer who brings this proceeding as alleged successor to the Alien Property Custodian, had notice over eight years before the commencement of this proceeding that Z. E. G. would not appeal (Exhibit V attached to the motion papers).

15. Subsequent to the payment of said judgment, together with certain other sums paid under the terms of the general settlement referred to in the moving papers, a dispute arose between said Sorenson and Nielsen on

the one part and Irving Trust Company, as Executor of the Estate of. Hermann Sielcken, on the other, as to their respective rights, if any, to the sums so recovered. Before that dispute reached the stage of litigation, the said Nielsen died and The Chase National Bank of the City of New York qualified as Executor under his will in the State of New Jersey. Shortly thereafter, the said Bank, having been appointed Ancillary Executor in the County of New York, as aforesaid, instituted an action in the Supreme Court, County of New York, against said Sorenson, the Irving Trust Company, as 818
Executor of the Sielcken Estate, and Clara Sielcken-Schwarz (Sielcken's widow), claiming that said Nielsen had been personally entitled to a twelve and a half per cent partnership interest in said sums. Said Sorenson, who was a defendant in that action, answered therein, making the counterclaim that he also was entitled to a share and asserted that he alone, since the death of said Nielsen, was entitled to liquidate the assets of the firm of Crossman & Sielcken, as sole surviving and liquidating partner of that firm. While this matter was in dispute all moneys received from said settlement, including moneys received under the judgment of December 30, 1929, were held in a special account in the name 819
of Crossman & Sielcken in liquidation and John S. Sorenson and Thorleif S. B. Nielsen, Liquidators, from which no disbursements could be made, except with the countersignature of the Irving Trust Company, as Executor of the Sielcken Estate, said estate asserting that it was entitled to all the assets of the firm of Crossman & Sielcken and had the right to liquidate said assets as the sole liquidator.

16. After an extensive trial of that case, a judgment was entered on November 11, 1933, in the Supreme Court for the County of New York, that neither said Sorenson nor said Nielsen was, under the articles of partnership of Crossman & Sielcken, entitled to the position of a liquidating partner and that they should turn over to said Irving Trust Company, as Executor

of the Sielcken Estate, all funds resulting from said judgment and/or settlement. Upon information and belief, said funds (less such sums as were paid therefrom to Z. E. G., the attorney for Z. E. G., Barnes, Avery & Whiting and others) were turned over as decreed and the Chase Bank never received or retained for or on behalf of the Nielsen Estate any part of such recovery, the entire sum (less such sums paid therefrom as heretofore mentioned) having been turned over to Irving Trust Company, as Executor of the Sielcken Estate. I am informed and verily believe that Niel-
821 sen never received any portion of the funds recovered under said judgment and/or settlement, and Chase Bank has received none.

17. The Attorney-General of the United States in his moving papers presents no excuse for failure to make his motion at the term at which this suit was tried, as required by law. No fraud or concealment in procuring the decree is charged or proved. The sole ground upon which this motion is made is alleged lack of jurisdiction without any definite specification as to wherein there was lack of jurisdiction. A summary contained in pages 33 to 36, inclusive, of the moving
822 affidavit of Frank C. Sterck, verified May 18, 1938, bases this motion to vacate and set aside the decree of December 30, 1929, upon the alleged grounds

(1) That neither Sorenson nor Nielsen was lawfully entitled to act as liquidator or as liquidating partner of the firm of Crossman & Sielcken and that neither Sorenson nor Nielsen had any interest in the assets or profits of the firm;

(Obviously, this was not known or believed by any of the counsel then in this suit to be true on or before December 30, 1929. The judgment of the Supreme Court, New York County, declaring that Sorenson and Nielsen were not liquidating partners was not entered until November 11, 1933, after protracted litigation over the question as to whether or not Sorenson was entitled-

to be the sole liquidating partner, or whether the Irving Trust Company, as Executor of the Sielcken Estate, held that exclusive right. The question of the right of liquidation of the partnership assets was highly controversial and involved many disputed questions of law and fact, and the question was resolved in favor of the Irving Trust Company, as Executor of the Sielcken Estate, only after the period for an appeal from the Judgment of November 11, 1933, deciding this question in favor of said Irving Trust Company, had expired.)

824

(2) That the Alien Property Custodian immediately after October 6, 1917, seized all the assets of Crossman & Sielcken and title became vested in the United States, thereby divesting said Sorenson and Nielsen of any interest therein;

(There is no evidence in the moving papers in support of this statement either in law or fact, and such was not the fact. On the contrary, the only semblance of claim that the Alien Property Custodian had ever made to the property of Crossman & Sielcken was, on information and belief, as follows:

In or about September, 1917, Sorenson and Nielsen were having great difficulty in obtaining from the War Trade Board permits for the export of goods, the firm of Crossman & Sielcken having been engaged in an exporting and importing business. 825

Hermann Sielcken died on October 8, 1917, although that fact did not become known in this country until on or about December 17, 1917.

On November 16, 1917, the War Trade Board [and not the Alien Property Custodian] gave to Sorenson and Nielsen a permit for making exports, a copy of which is hereto annexed and marked Exhibit A. Under the power of supervision reserved by said War Trade Board, said Board appointed the Alien Property Custodian to supervise with power of substitution. Acting thereunder, the Alien Property Custodian appointed

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the Columbia Trust Company on November 30, 1917, to exercise such supervision as his agent, a copy of said letter of appointment being annexed hereto and marked Exhibit B. In the exercise of such supervision, the Columbia Trust Company took into its possession stocks and bonds held by the firm of Crossman & Sielcken and made no attempt to seize its other assets.

Upon learning of said Sielcken's death, application was made to the Surrogate's Court of New York County for the probate of his will and the issue of letters
827 to said Columbia Trust Company [now Irving Trust Company]. Thereafter the Columbia Trust Company advised the Alien Property Custodian that in its opinion the Alien Property Custodian had no interest in the property of the firm of Crossman & Sielcken, that Sielcken's interest therein vested in the American executor, namely, the Columbia Trust Company, and requested that the Alien Property Custodian abandon the supervision of the liquidation before the War Trade Board and that he turn over the entire matter of liquidation to the executor. This was arranged early in January, 1918, and on January 14, 1918, the Alien Property Custodian sent a letter to the Columbia Trust
828 Company, of which a copy is hereto annexed and marked Exhibit C. Pursuant to that letter, the Columbia Trust Company applied to the War Trade Board for a permit and on January 21, 1918, the War Trade Board issued two permits, one to Sorenson and Nielsen and one to the Columbia Trust Company, copies of which are annexed hereto and marked Exhibits D and E, these permits superseding the prior permit of November 16, 1917, and the instructions therein contained.

In October, 1917, Sorenson and Nielsen, on behalf of the firm, had subscribed for $100,000 of Liberty Bonds and sent a check to Washington to pay for the same. In some way and by some unknown method, this check or the bonds were handed over to the Alien Property Custodian, who retained it, and the only application made by the Columbia Trust Company, or its successor, the

Irving Trust Company, for release of any property of Sielcken or of Crossman & Sielcken was for the return of that $100,000, which had never been seized by the Alien Property Custodian under the provisions of the Trading with the Enemy Act; and that $100,000, less some expenses which the Alien Property Custodian claimed to have incurred in connection therewith, was subsequently returned to the Columbia Trust Company, as Executor, which immediately turned the amount over to the residuary legatee, photostatic copies of the statement of the property taken and the receipt given upon the return thereof being annexed hereto and marked Exhibits F and G. 830

There was no other attempt at seizure by the Alien Property Custodian of the assets of Crossman & Sielcken, nor was there any attempt to seize the property of Hermann Sielcken as that of an enemy, nor could there have been because he died before any Alien Property Custodian was appointed. Nor was any demand made by the Alien Property Custodian either of Sorenson or of Nielsen or of the Columbia Trust Company that they turn over to him any interests of Herman Sielcken in the firm property for the interest of Clara Sielcken [now Clara Sielcken-Schwarz] in the estate of Hermann Sielcken. 831

In point of fact, however, in October, 1918, the Alien Property Custodian did serve a demand on the Columbia Trust Company for the interest of Clara Sielcken, the widow of said Hermann Sielcken, deceased [now Clara Sielcken-Schwarz] in the estate of Hermann Sielcken. That demand he withdrew in 1921, acting under instructions of the Attorney-General, so that the intimation that the Alien Property Custodian immediately after October 6, 1917, seized all the assets of Crossman & Sielcken and title thereto became vested in the United States, and Sorenson and Nielsen thereby divested of any interest therein, is entirely contrary to the facts.

(3). That Sorenson and Nielsen, when they instituted suit, had full knowledge that the Irving Trust Company was the sole owner of the partnership claim but was

832 *Affidavit of Vincent L. Banker, Verified June 3, 1938*

precluded from filing same because the said Sielcken was an enemy;

(There is no evidence in the moving papers of such knowledge on the part of either Sorenson or Nielsen; to the contrary, it appears that that issue was raised in the suit and determined adversely to the United States. As between Sorenson, Nielsen and the Irving Trust Company, as Executor, etc., the question of who was entitled to the assets of the partnership and to act as liquidator was not determined until November 11, 1933).

833 (4) That said Sorenson and Nielsen had knowledge at the time of the claim that Theodor Wille of Hamburg, Germany, had an interest in said claim;

(The fact is that such claim, as Wille later asserted, came up in connection with the settlement of the Mixed Claims Commission proceeding against Wille, and, as this deponent is informed and believes, was not a claim against the firm of Crossman & Sielcken, and the moving papers show that the Department of Justice and the Attorney-General had full knowledge thereof in 1930.)

834 (5) That there was an indemnity agreement between Z. E. G. and the German executors of Sielcken, who had nothing to do with the partnership assets of Crossman & Sielcken, but who had made an agreement in Germany whereby they had promised to save Z. E. G. harmless against any claim by Crossman & Sielcken on account of the shipments, seizure of which resulted in the damages awarded in the judgment of December 30, 1929.

(Again, the moving papers themselves show full knowledge in 1930 of such alleged indemnity agreement on the part of the United States and settlement of the claims in payment of the judgment of December 30, 1929, on the basis of such knowledge.)

18. The present position of the Chase Bank is as follows:

It has fully accounted as Ancillary Executor of the Nielsen Estate and, in accordance with the decree of

December 20, 1934, turned over, long prior to the service of the motion papers herein, all the assets of that estate remaining in its hands to the legatees of Thorleif S. B. Nielsen, in pursuance of the decree upon such accounting and has been fully discharged. Said bank is no longer acting in the capacity of Ancillary Executor or Ancillary Administrator of said Estate and was not so acting at the time of service of the motion papers herein.

19. I am informed and verily believe that such moneys as were paid under the decree of December 30, 1929, were 836 ultimately received years ago either by the Irving Trust Company, as Excutor of the Estate of Hermann Sielcken, deceased (or the predecessor company to said Irving Trust Company), Zentral Einkaufsgesellschaft (or its alleged successor, the German Reich) or its attorney, Arthur Garfield Hays, Esq., of New York City, or Theodor Wille, Santos, Brazil, or the firm of Barnes, Avery & Whiting, Avery & Whiting, Clara Sielcken-Schwarz, and Alexander W. Sielcken. I am informed that none of said moneys were paid to Thorleif S. B. Nielsen during his lifetime and I aver that none of said moneys were paid to the Chase Bank.

837

20. The Chase Bank is advised by counsel, and verily believes, that upon any application to vacate a decree of this court made many years after its entry upon the grounds set forth in the moving papers, it is the law that notice of such motion must be given to all parties who have meantime acquired any interest under such decree so that they may have an opportunity to be heard on any such application.

21. In addition to the lack of notice to the Treasurer of the United States or Zentral Einkaufsgesellschaft, parties to this suit as aforesaid, no notice has been given to

(1) Irving Trust Company, as Executor of the Estate of Hermann Sielcken, deceased;

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(2) Clara Sielcken-Schwarz, residuary legatee of the Estate of Hermann Sielcken;

(3) Arthur Garfield Hays, Attorney for Z. E. G.;

(4) Theodor Wille;

(5) Barnes, Avery & Whiting, or Avery & Whiting;

(6) Alexander W. Sielcken.

22. The Chase Bank, as Ancillary Executor, or as Executor of the Estate of Thorleif S. B. Nielsen, has no
839 funds of said estate whatsoever, and respectfully submits that it is not a necessary or proper party to this proceeding and that it is without interest therein.

23. I am informed that the Attorney-General of the United States has appeared in an accounting proceeding by the said Irving Trust Company, as Executor of the Estate of Hermann Sielcken, deceased, now pending in the Surrogates' Court for the County of New York, and has there served and filed what he terms an objection to the account, a copy of which is annexed hereto and marked Exhibit H. That document discloses that the purpose of the application to vacate the said decree of
840 this court dated December 30, 1929, is made to reach sums paid over to the Irving Trust Company, as Executor of the Sielcken Estate, and accounted for by it in its account in that proceeding.

24. The Chase Bank, therefore, represents to this court that all the persons disclosed in the moving papers on the application herein to vacate the judgment as having received funds out of the proceeds of that judgment should be cited to present their rights and to have an opportunity of opposing the vacation of such judgment, and that upon such citation as may be ordered by this court, the Chase Bank be relieved of any further burden in this matter, and that this proceeding be dismissed as against it.

25. The names of the persons disclosed by the moving papers as having an interest in said decree of Decem-

ber 30, 1929, are as follows, upon information and belief:

(1) Irving Trust Company, as Executor of the Estate of Hermann Sielcken, deceased, 1 Wall Street, New York City;

(2) Arthur Garfield Hays, Esq., 120 Broadway, New York City;

(3) Treasurer of the United States, Washington, D. C.;

842

(4) Zentral Einkaufsgesellschaft, Berlin, Germany (appeared in this suit by Arthur Garfield Hays, Esq.);

(5) Theodor Wille, Santos, Brazil;

(6) Clara Sielcken-Schwarz, Klopstockstrasse 3, Sontenay, Hamburg, Germany;

(7) Alexander Wendroth Sielcken, c/o The Chase National Bank, 11 West 42nd Street, New York City;

(8) Marie F. Barnes, as Executrix of the Estate of Earl V. Barnes, 145 Beaumont Street, Brooklyn, N. Y.;

(9) Brainard Avery, Esq., 55 Liberty Street, New York City

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Jay E. Whiting, Esq., 55 Liberty Street, New York City

George O. Castell, 55 Liberty Street, New York City.

26. No previous application for the relief herein sought has been made to any other court or judge.

WHEREFORE, Chase Bank prays that service of the motion papers to vacate the said decree of December 30, 1929, in this suit upon said The Chase National Bank of the City of New York, as Ancillary Administrator of the Estate of Thorleif S. B. Nielsen, deceased, be vacated, set aside, cancelled and annulled or, in the alternative, that the Attorney General of the United States be directed to give notice of said motion to vacate the decree of December 30, 1929, to the above named per-

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sons and parties, and upon such notice being given to said parties and persons as the court may direct that this proceeding be dismissed as against said Chase Bank, and that the time of said Chase Bank to file affidavits in answer to the moving papers herein be extended until ten (10) days after the decision upon this motion to vacate or bring in additional parties.

VINCENT L. BANKER.

Sworn to before me this
3rd day of June, 1938.
845 SHERMAN L. ANDERSON,
Sherman L. Anderson,
Notary Public,
Westchester County.
Certificate Filed in New York County
No. 217, Register No. 9-A-156.
Certificate filed in Kings County
No. 24, Register No. 9131.
Commission Expires March 30, 1939.
(Seal)

846

Exhibit A.

Exhibit A of Affidavit of Vincent L. Banker.

This is a duplicate of Exhibit F of the Affidavit of Frank C. Sterck of May 18, 1938, which exhibit is printed above on pages 85 to 86.

Exhibit B.

Exhibit B of Affidavit of Vincent L. Banker.

This is a duplicate of Exhibit G of the Affidavit of Frank C. Sterck of May 18, 1938, which exhibit is printed above on pages 87 to 88.

Exhibit C of Affidavit of Vincent L. Banker. 847

Exhibit C.

ALIEN PROPERTY CUSTODIAN

Sixteenth and P Streets, N. W.

Washington, D. C.

New York, January 14, 1918.

Crossman & Sielcken.

Mr. G. E. Warren, V. P., 848
Columbia Trust Co.,
60 Broadway, N. Y. C.

Dear Sirs:

I acknowledge receipt of a certificate evidencing your appointment as temporary administrator of the Estate of Hermann Sielcken.

Under date of November 31, 1917, you were appointed my Agent for the purpose of supervising the liquidation of the interest of Hermann Sielcken in the firm of Crossman & Sielcken under license ET-344, issued by the War Trade Board.

In view of the death of Mr. Sielcken, and your appointment as temporary administrator and nomination 849
as executor of his will, you are hereby authorized as such temporary administrator, and executor when letters are issued to you, to take possession of all the assets of the late Hermann Sielcken as of October 8, 1917, the date of his death, and to account for them thereafter in due course of administration. In liquidating the interest of the late Hermann Sielcken in the firm of Crossman & Sielcken you will, of course, pay the necessary expenses incident thereto and the debts owing by the firm, the estate being the sole owner thereof.

It will, however, be necessary for you to obtain a license from the War Trade Board authorizing you to take over and manage the estate of said Sielcken as such administrator and executor.

850 *Exhibit C of Affidavit of Vincent L. Banker*

A statement of the assets and liabilities of the firm of Crossman & Sielcken as of September 30, 1917, was prepared by Arthur Young & Co. under the direction of this Department which statement, for the purposes of liquidation, is satisfactory to this Department. This statement is to be continued down to October 8, 1917, the date of Mr. Sielcken's death, for the purpose of establishing the value of the estate taken over by you.

The settlement made with the surviving partners, whose interest terminated upon the dissolution of the
851 firm, is approved.

Yours very truly,

(Signed) J. A. BOWER, Mgr.
Genl. Business Dept.

852

Exhibit D of Affidavit of Vincent L. Banker. 853

Exhibit D.

WAR TRADE BOARD
Washington, D. C.

License No. ET-7454
Date Jan. 21, 1918
Expires .....
Applicant's No. .....

UNITED STATES
OF
AMERICA 854

License issued under Section 5 (a) of the Trading with the Enemy Act.

License is hereby granted to JOHN S. SORENSON and THORLEIF S. B. NEILSEN, of 90 Wall Street, New York, N. Y., to continue the business of the co-partnership of Crossman & Sielcken, of which Herman Sielcken, deceased, was a member, for the purpose of liquidating and disposing of the interest of the estate of said Herman Sielcken, deceased, in the business, assets and property of the said firm of Crossman & Sielcken, and in the course 855 of same to trade with any person, firm or corporation, excepting an "enemy" or "ally of enemy" not holding a license under this act, or a person acting on behalf of or for the benefit of such "enemy" or "ally of enemy."

The licensees may, however, collect any sums due from the "enemies" or "allies of enemies" and persons acting on behalf of or for the benefit of such "enemies" or "allies of enemies," a list of whom has been forwarded to the War Trade Board and the Alien Property Custodian.

It is a term and condition of this license that

(1) Said liquidation shall be carried out under the supervision of Arthur Young & Co., of New York, as Certified Public Accountants, and under such additional

856 *Exhibit D of Affidavit of Vincent L. Banker*

supervision and in accordance with such plan and method as may be desired by the Alien Property Custodian, and all expenses of such supervision shall be paid as part of the expenses incidental to said liquidation;

(2) The licensees shall transfer to the Alien Property Custodian, whenever he shall so require, the whole or any part of the share of the said estate of Herman Sielcken, deceased, in the proceeds of the aforesaid liquidation;

857 (3) A report of the progress of said liquidation shall be made to the Alien Property Custodian and the War Trade Board at the end of each calendar month, or oftener if required; and

(4) This license is revocable and subject to amendment in the discretion of the War Trade Board.

JLS

This license is issued on the basis of the statements made in your application, and is subject to the rules and regulations which have been, or which may be hereafter,
858 issued by the War Trade Board, and to any special conditions that may be set out herein.

WAR TRADE BOARD,
Vance C. McCormick, Chairman,

BUREAU OF ENEMY TRADE,
By John Henry Hammond (Signed)
per J. L. S.

(Seal)

This license is not valid
unless signed and impressed
with the seal of the War Trade
Board.

THIS LICENSE IS REVOCABLE.

Exhibit E of Affidavit of Vincent L. Banker. 859

Exhibit E.

WAR TRADE BOARD
WASHINGTON, D. C.

License No. ET-7453
Date January 21, 1918
Expires 191
Applicant's No.

UNITED STATES
OF
AMERICA 860

License issued under Section 5(a) of the Trading with the Enemy Act.

License Is Hereby Granted To Columbia Trust Company, of 60 Broadway, New York, N. Y., to engage in trade on behalf of the devisees and legatees under the will of Hermann Sielcken, deceased, by acting as temporary administrator and executor under said will.

This license is granted upon the following terms and conditions: 861

1. That any money or property now or hereafter held by said licensee, which any "enemy" or "ally of enemy" would at any time or times be entitled to receive if he were not an "enemy" or "ally of enemy" shall, at such time or times, either upon or without demand therefor, be conveyed, transferred, assigned, delivered, and paid over to the Alien Property Custodian, whether or not so required by the President or by the Alien Property Custodian, notwithstanding any act of an "enemy" or "ally of enemy," or of another, including the licensee herein, done or attempted since the "enemy" or "ally of enemy" became such, or in contemplation of his becoming such.

2. That no payment of any money or other property shall be made to, for, on account of, or for the benefit of

862 *Exhibit E of Affidavit of Vincent L. Banker*

any person who is an "enemy" or "ally of enemy," nor shall any form of business, commercial or other communication, or intercourse, be had with any "enemy" or "ally of enemy," whether said "enemy" or "ally of enemy" is a party in interest in said estate or otherwise.

3. That the words "enemy" and "ally of enemy" are used in this license with the meaning defined by the "Trading with the Enemy Act."

863 JLS.

This license is issued on the basis of the statements made in your application, and is subject to the rules and regulations which have been, or which may be hereafter, issued by the War Trade Board, and to any special conditions that may be set out herein.

WAR TRADE BOARD,
VANCE C. McCORMICK, Chairman

Bureau of Enemy Trade,

864

By John Henry Hammond
per J. L. S.

(Seal)

This License is not valid unless signed and impressed with the seal of the War Trade Board.
Form WTB 104

THIS LICENSE IS REVOCABLE

[illegible]-778.

Claim.....[illegible].....
3/31/21

ALIEN PROPERTY CUSTODIAN

Statement of Property taken over under Trust.....1.....

in the name of.....Herman Sielcken.....

except payments received by depositary since last report.

Report	Received from	Property Received	Income			Property Except Cash to be returned	Cash to be returned
17[illegible]	Columbia Trust Co., as executor of Est. of Herman Sielcken, and Cressman & Sielcken, N.Y.C.	All right, title and interest of Herman Sielcken, now deceased in the copartnership of Cressman & Sielcken.					
		Received on account of the liquidation of Cressman & Sielcken.....					[illegible]
		Paid expenses from this trust:					
		To Jos. K. Hutchinson.....				$ 2,[illegible]	
		To Knight, Boland, Hutchinson & Christian.....				[illegible]	[illegible]
						Balance to return.....	$ [illegible]

VINCENT L. BAKER.

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EXHIBIT G of AFFIDAVIT of VINCENT L. BAKER.

Receipt of a Corporation Claiming any Interest, Right or Title in or to Money or Property on Claim Filed under Section 9 of the Trading with the Enemy Act.

Trust No. 2 Claim No. 8014

WHEREAS, pursuant to the provisions of Section 9 of the Act of Congress known as the "Trading with the Enemy Act", and the regulations of the Alien Property Custodian in relation thereto, the undersigned has heretofore filed with the Alien Property Custodian notice of claim against the money and property in the hands of said Custodian or the Treasurer of the United States taken as the property of HERMAN SIELCKEN and/or ESTATE OF HERMAN SIELCKEN, determined by said Custodian to be an enemy, and has also made application to the Attorney General of the United States for the allowance of said claim under the authority conferred on said Attorney General, by Article XXXII of the Executive Order of October 12, 1917; and

WHEREAS, the Attorney General, exercising the authority so conferred, has ordered the payment of the money or delivery of the property hereinafter described to this applicant;

NOW, THEREFORE, in consideration of the premises, Columbia Trust Company, as Executor of the Will of Herman Sielcken, deceased, a corporation in the State of New York, the undersigned, does hereby acknowledge payment of the money or delivery of the property to it by the Alien Property Custodian and the Treasurer of the United States as follows, to-wit:

Check of the Treasurer of the United States, No. on Special Account No. 8 to the order of Columbia Trust Company as Executor of the Will of Herman Sielcken, deceased, Trust #1, for the sum of Ninety-four Thousand, Three Hundred Fifty-one Dollars and Thirty Cents ($94,351.30); also All right, title and interest of Herman Sielcken, now deceased, in the copartnership of Grossman & Sielcken.

And does hereby further acknowledge and accept such money or other property as a full compliance with said order; reserving, however, to the Executor the right to claim and receive interest if and when provision may be made by legislation to that end.

In consideration of the premises, Columbia Trust Company, as Executor of the Will of Herman Sielcken, deceased, the undersigned, as aforesaid, does hereby release and forever discharge the President of the United States, the Treasurer of the United States, A. Mitchell Palmer, individually and as Alien Property Custodian, Francis P. Garvan, individually and as Alien Property Custodian, and all other persons exercising the authority of them or of Thomas W. Miller, individually and as Alien Property Custodian, all other persons exercising the authority of them, or of

EXHIBIT G of AFFIDAVIT of
VINCENT L. BAKER, cont'd.

any of them, from any and all right, claims and demands of every kind, character and description, whether joint or several, which it may have, based upon or arising out of any and all money or other property paid to or received by the Alien Property Custodian, or by the Treasurer of the United States as the money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of

HERMAN SIELCKEN and/or ESTATE OF HERMAN SIELCKEN

and does further release and forever discharge them in respect to anything done or omitted in pursuance of any order, rule or regulation made by the President under the authority of this Act. to the extent of the property above described.

IN WITNESS WHEREOF, Columbia Trust Company, as Executor of the Will of Herman Sielcken, deceased, the corporation as aforesaid, has caused these presents to be executed by George E. Warren, its Vice President, and its corporate seal to be hereunto affixed and attested by Lawrence M. Spedon, its Asst. Secretary, this 5 day of April A.D. 1921.

Signed and Sealed in the Presence of:

[signature] Morgan

[signature] Wilkens

Columbia Trust Co.
[illegible] Sielcken

By [signature] Vice President

ATTEST: [signature] Spedon
Secretary

STATE OF New York }
COUNTY OF New York } SS.

On the 5th day of April in the year 1921, before me personally came G. E. Warren to me known, who, being by me duly sworn, did depose and say that he resides in New York City that he is the Vice-President of The Columbia Trust Co., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

M. B. Lafourcade

[illegible]
[illegible]
[illegible] MARCH 30TH, 1922.

APC-MM-872/

874 *Exhibit H of Affidavit of Vincent L. Banker.*

Exhibit H.

SURROGATE'S COURT,

NEW YORK COUNTY.

IN THE MATTER

of

875 The judicial settlement of the account of Proceedings of Irving Trust Company as Executor of Herman Sielcken, deceased.

Homer S. Cummings, as Attorney General of the United States, and as successor of the Alien Property Custodian, in behalf of the United States of America, as intervener, for his answer and objections to the account herein, by his attorney, Lamar Hardy, United States Attorney for the Southern District of New York, upon information and belief alleges:

876 1. That John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, instituted an action in the United States District Court for the Southern District of New York in purported compliance with the provisions of the Trading with the Enemy Act, as amended (40 Stat. 411) against Howard Sutherland, as Alien Property Custodian, Frank White, as Treasurer of the United States, and Zentral Einkauf Gesellschaft m.b.h., defendants, equity number 44-28, Southern District of New York, and by final decree dated December 30, 1929, recovered $716,160.37, and said final decree was satisfied in full in the sum of $726,681.40, out of moneys held by the Alien Property Custodian and the Treasurer of the United States under the provisions of the Trading with the Enemy Act, as amended.

Exhibit H of Affidavit of Vincent L. Banker 877

2. The executor accounts for the proceeds of said recovery on page 53 et seq., Schedule I, page 2, of the instant account of proceedings of the executor.

3. A Notice of Motion to Vacate the aforesaid Final Decree upon the affidavit of Frank C. Sterck, attorney, Department of Justice, and exhibits annexed thereto, verified the 18th day of May, 1938, was served upon said John S. Sorenson and upon the Chase National Bank of the City of New York, as ancillary executor of said Thorleif S. B. Nielsen, on the 19th day of May, 1938, and said motion is returnable at the term of the United 878
States District Court for the Southern District of New York, for motions, to be held on the 3rd day of June, 1938, on the ground that said final decree is void because that Court was without jurisdiction to enter the same.

4. This objectant objects to the account of the executor, without making specific objections thereto, but reserving the right to file specific objections thereto upon order of this Court and upon the determination of the said Motion to Vacate the Final Decree in said action in equity number 44-28, United States District Court for the Southern District of New York, on the ground that 879
until said determination of said motion, the executor may not secure a judicial settlement of the account of moneys and property, the title to which is now being questioned by said Motion to vacate said Final Decree as being the moneys and property of the United States of America.

Dated, New York, N. Y., May 19, 1938.

LAMAR HARDY,
United States Attorney for the Southern
District of New York,
Attorney for Objectant,
Office and P. O. Address,
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

880 *Exhibit H of Affidavit of Vincent L. Banker*

State of New York,
County of New York, ss:

David W. Wainhouse, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York; that he has read the foregoing Objections and knows the contents thereof, and that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

881

DAVID W. WAINHOUSE

Sworn to before me this
19th day of May, 1938.
Armand Chankalian,
Notary Public,
New York Co.
Clerk's No. 301, Reg. No. 9C392.
Commission expires March 30, 1939.

882

Order of June 15, 1938, Vacating Service of Notice, etc., on Chase National Bank. 883

At a Stated Term of the United States District Court held in and for the Southern District of New York, at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 15th day of June, 1938.

Present: Honorable John W. Clancy,
United States District Judge.

884

JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

against

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and ZENTRALEINKAUFS-GESELLSCHAFT, M. B. H.,
Defendants.

Order E44-28

885

A motion having been duly made by the Attorney-General of the United States as successor to the Alien Property Custodian for an order vacating the final decree entered in this cause on the 30th day of December, 1929.

Now, after reading and filing notice of motion to vacate final decree, the affidavit of Frank C. Sterck, and exhibits attached thereto, duly verified the 18th day of May, 1938, all in support of said motion, the order to show cause of the Chase National Bank of the City of New York, as ancillary executor of the estate of Thorlief S. B. Nielsen, appearing specially, and after hearing Chadbourne, Wallace, Parke & Whiteside, Esqs. (Leonard P. Moore, Esq., of counsel), attorneys for the Chase National Bank of the City of New York, as ancil-

886 *Order of June 15, 1938, Vacating Service of Notice, etc., on Chase National Bank*

lary executor of the estate of Thorlief S. B. Nielsen, declare that the Chase National Bank of the City of New York has been discharged as ancillary executor of the estate of Thorlief S. B. Nielsen and that it has no further interest of any kind in said estate, and Lamar Hardy, United States Attorney for the Southern District of New York, attorney for the Attorney-General of the United States, as successor to the Alien Property Custodian (Francis J. McNamara, Esq., of counsel) and due
887 deliberation having been had thereon,

Now, on motion of Lamar Hardy, United States Attorney for the Southern District of New York, attorney for the Attorney-General of the United States, as successor to the Alien Property Custodian, it is

Ordered that the service of the notice of motion, affidavit of Frank C. Sterck with exhibits attached thereto, to vacate the final decree entered in this cause on the 30th day of December, 1929, served upon the Chase National Bank of the City of New York, as ancillary executor of the estate of Thorlief S. B. Nielsen, be and the same is hereby vacated, annulled and declared to be of no effect.

888

JOHN W. CLANCY,
United States District Judge.

Order to Show Cause of June 16, 1938. 889

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAT, m. b. H., 890

Defendants.

Equity No. 44-28

In proceedings to vacate final decree of December 30, 1929.

Upon the annexed petition of the Irving Trust Company as Executor of Hermann Sielcken, deceased, and 891 the exhibits thereto annexed, and the annexed affidavit of Selden Bacon, and the notice of motion by the Attorney-General of the United States dated the 18th day of May, 1938, to vacate the final decree of this Court of December 30th, 1929, entered in the suit brought in this Court by John S. Sorenson and Thorleif S. B. Nielsen as surviving liquidating partners of the firm of Crossman & Sielcken, Plaintiffs, against Howard Sutherland as Alien Property Custodian and others, Defendants, and the affidavit and exhibits annexed to said notice of motion,

Let the Attorney-General of the United States show cause, if any there be, before this Court at a term thereof for the hearing of motions to be held on the 24th day of June, 1938, at the Federal Court House in the Borough of Manhattan and Southern District of New York, at the

892 *Order to Show Cause of June 16, 1938.*

opening of Court on said day or as soon thereafter as counsel can be heard, why the said Irving Trust Company as such executor of Hermann Sielcken, deceased, should not be permitted to intervene in this proceeding to vacate said decree as prayed in its said annexed petition and oppose and answer such proceeding to vacate said decree of December 30th, 1929; and why the Attorney-General of the United States should not be required to serve a copy of his notice of such motion to vacate said decree and the papers thereto annexed on the solicitors appear-
893 ing for said Irving Trust Company as such executor of Hermann Sielcken, deceased, within a time to be fixed by this Court; and why the said Irving Trust Company as such executor should not have twenty days in which to answer such motion papers; and why the hearing of such motion to vacate said decree and any action upon such motion should not be stayed until the said Irving Trust Company shall have had such opportunity to serve its answerng papers upon the said motion and then be brought on for hearing on not less than two days' notice of the time and place of such hearing.

Meantime, and until the disposition of this application to intervene all proceedings on said motion to vacate
894 said decree of December 30th, 1929, are hereby stayed.

Let service of this order and annexed petition and affidavit on the attorney for the Attorney-General on or before June 17th, 1938, be sufficient.

JOHN W. CLANCY,
U. S. D. J.

June 16th, 1938.

Petition of Irving Trust Company as Executor for Leave to Intervene in Proceedings to Vacate. 895

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against 896

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAT, m. b. H.,

Defendants.

Equity No. 44-28

In proceedings to vacate final decree of December 30, 1929.

The petition of Irving Trust Company as Executor of 897 the last Will and Testament of Hermann Sielcken, deceased, respectfully shows to this Court:

1. That on the 26th day of January, 1918, the name of this corporation, the Irving Trust Company, was Columbia Trust Company, and at various times between 1918 and 1930 was changed, until it finally, to wit, on the 1st day of February, 1929, became Irving Trust Company, which ever since has been and is now its true name. And it is still through all its changes of name the same corporation as the Columbia Trust Company.

That on the 8th day of October, 1917, Hermann Sielcken died, but that information of his death was not obtained in the United States until on or about the 17th day of December, 1918; that promptly after the information of his death was received this corporation filed his will for probate in the Surrogate's Court for

898 *Petition of Irving Trust Company as Executor for Leave to Intervene in Proceedings to Vacate*

New York County, which had jurisdiction to admit the same to probate, and pending probate thereof said Columbia Trust Company obtained temporary letters of administration of the estate of said Hermann Sielcken from said Surrogate's Court, to wit, on the 27th day of December, 191[illegible], and thereafter, to wit, on the 26th day of January, 1918, said will was admitted to probate by the said Surrogate's Court and letters testamentary were immediately issued by it to the Irving Trust Com-
899 pany under its said former name of Columbia Trust Company, which has duly qualified as such, and that it has ever since been and now is the executor of the last will and testament of said Hermann Sielcken, deceased, as to all the American assets of the said decedent Sielcken, including all his interest and rights in the former partnership of Crossman & Sielcken of which he and the above named John S. Sorenson and Thorleif S. B. Nielsen had been the sole members; that said Thorleif S. B. Nielsen died, to wit, on the 9th day of September, 1930, subsequent to the entry of the final decree herein and to the payment of the sum thereby awarded, and the above named John S. Sorenson is now the sole
900 surviving member of said former firm of Crossman & Sielcken.

2. On information and belief that the above entitled suit was commenced on or about the 21st day of December, 1927. That the defendants Howard Sutherland as Alien Property Custodian and the Treasurer of the United States jointly and the Zentral Einkaufs Gesellschaft, severally, each appeared and answered in the cause; and thereafter the same was tried in this court in December, 1929, before Hon. Francis G. Caffey, a Judge of this Court, and on the 30th of December, 1929, final decree was entered herein by this Court awarding to the plaintiffs the sum of $716,160.37 upon the cause of action set up in the bill of complaint, which, with accrued interest thereon from the entry of the decree, was thereafter paid by the defendant, the Treasurer of the United States, to the said plaintiffs, to wit, on the

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8th day of April, 1930. That the term of this Court at which such decree was entered expired in 1930. That no appeal was ever taken from the said decree and that the time for any appeal therefrom elapsed during the year 1930.

Copies of the bill of complaint and of the several answers in the said cause and of the said final decree herein, save only the Exhibit attached to the answer of the Treasurer and Alien Property Custodian, which is on file in this Court, are hereto annexed marked respectively Exhibits A, B, C and D and hereby made parts of this applicaton. 902

No appeal was ever taken from such decree and the time for appeal long since elapsed. No motion for a new trial was ever made. Nor has any bill of review ever been filed in connection with such decree.

3. Your petitioner further shows, on its information and belief, that subsequent to the recovery of said decree of December 30, 1929, dispute arose between said Sorenson and said Nielsen's Ancillary Executor, the Chase National Bank of New York, on the one part, and your petitioner, the Irving Trust Company as executor of Hermann Sielcken, deceased, on the other part, as to the rights of the said Sorenson and said Nielsen respectively to any part of the sums so recovered and other sums received under a claim allowed by the Mixed Claims Commission—United States and Germany, as their alleged shares of the profits of the firm of Crossman & Sielcken, and an action was instituted in the Supreme Court for New York County by the Chase National Bank as Ancillary Executor of said Nielsen to recover twelve and one-half per cent of the net amounts of such recoveries, as his share of such profits. Said Sorenson was made a defendant in that action as was also the Irving Trust Company as such Executor and Clara Sielcken Schwarz, the widow of said Sielcken as residuary legatee under his will. That in that action said Sorenson also counterclaimed, making the like claim as the executor of said Nielsen to a like share 903

904 of the sums so recovered as his share of the profits, and in that action said Sorenson also counterclaimed, asserting as he had previously asserted that as sole surviving partner of the firm of Crossman & Sielcken he was entitled to receive all the moneys recovered on behalf of the firm and to liquidate the same; and in that action a judgment was rendered on November 11, 1933, a copy of which is annexed to the affidavit of Frank C. Sterck on behalf of the Attorney-General, on which is based
905 the application of the Attorney-General to vacate the said decree herein of December 30, 1929, hereinafter mentioned, being Exhibit Z of that affidavit. Said judgment was rendered after a long trial before Hon. Henry F. Wolff, the Referee appointed to hear and determine the same, which trial had been begun before him in December, 1931, and in which the question as to the right to liquidate the firm assets had been litigated and argued at great length between said Sorenson and this Trust Company as Executor of said Sielcken.

Your petitioner further shows that thereafter and under and pursuant to the judgment so rendered in that action in 1933, a large portion of the sums which
906 had been recovered by said Sorenson and said Nielsen under and by virtue of said decree of this Court of December 30, 1929, was turned over to your petitioner as executor of Hermann Sielcken, deceased, for administration by it as such executor.

Your petitioner further shows, on its information and belief, that said John S. Sorenson is wholly without means and has informed your petitioner that he has no means with which to contest the said application of the Attorney-General to vacate said decree; and that the service of notice of such application on the Ancillary Executor of Nielsen has been, with the consent of the Attorney-General of the United States, directed to be cancelled.

Your petitioner further shows that in said action in the Supreme Court of the State of New York the question whether said Sorenson and said Nielsen had the

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right to maintain the present suit as surviving liquidating partners of the firm of Crossman & Sielcken was not litigated or in issue; that in point of fact in June, 1918, years before this administrator had any knowledge or information whatsoever of the existence of the claim which was asserted in the suit in this court, this executor had sent said Sorenson and Nielsen a letter, of which copy is hereto annexed, marked Exhibit E and hereby made a part of this petition; and the said Sorenson and Nielsen had accepted the same and had, in 908
1918, brought an action in their names as surviving liquidating partners of the firm of Crossman & Sielcken in the Supreme Court for New York County, against George C. Boldt and Clover Boldt Miles, as Executors of George C. Boldt, deceased, which action was compromised before trial by the payment of approximately $100,000 to the firm of Crossman & Sielcken, which sum was turned over to your petitioner upon recovery thereof, for administration. That as your petitioner is advised and believes, the said letter and acceptance thereof and action thereunder constituted an agreement amending the provisions as to liquidation of the partnership affairs to the limited extent therein provided; that that 909
authorization was given in entire good faith and with no special reference to the particular claim asserted nine years later in the said suit of 1927 in this Court, the existence of which claim was unknown to your petitioner until May, 1927.

Your petitioner is further informed and believes that the position claimed by said Sorenson and Nielsen to be entitled to sue as liquidating partners was in 1927 and prior to May, 1930, supported by the opinions of many members of the bar, including, as your petitioner is informed and believes, the firm of Davies, Auerbach & Cornell, who instituted the 1918 Boldt action in the names of Sorenson and Nielsen as surviving liquidating partners of the firm of Crossman & Sielcken, in which by a compromise the said sum of approximately $100,000 was collected in 1919; also by the firm of

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Griggs, Baldwin & Baldwin, who appeared for the defendant in that action, and made the compromise; by the firm of Tibbetts, Lewis & Rand, who appeared for the defendant Sorenson in said action brought by the Chase National Bank as ancillary executor of Nielsen, and, as your petitioner is informed and believes, by all the attorneys who appeared for the plaintiffs in the present suit.

Your petitioner further shows on its information and
911 belief that all the facts on which the judgment of November 11, 1933, adjudging that said Sorenson did not hold the position of liquidator of the firm of Crossman & Sielcken were fully known to the Alien Property Custodian at the time of the trial of this suit of Sorenson and Nielsen in this court; that the decision of the Supreme Court of New York that Sorenson was not a liquidating partner was predicated on the Articles of Co-partnership, which were put in evidence before the Court in this suit during the trial thereof, and on the will of said Hermann Sielcken, of which the Alien Property Custodian had been fully advised by the proceedings on the first accounting of the Columbia Trust Com-
912 pany as such executor in 1919, on which accounting the Alien Property Custodian had appeared and filed objections, and was predicated in addition to some extent on the fact that said Sorenson and said Nielsen had been paid nearly $50,000 apiece by the Executor of Sielcken as the executor's assistants in liquidating the affairs of Crossman & Sielcken, to no part of which they would have been entitled had they been actually liquidating partners in the ordinary sense; that a very large part of said payments to them (which consisted of $1,000 a month apiece, pursuant to the provisions of the will of said Sielcken) were set forth in the said first account of the executor, to which accounting before the Surrogate the Alien Property Custodian was made a party, and appeared. The Alien Property Custodian knew also in 1927, of the settlement made in December, 1917, with Sorenson and Nielsen for their shares of the profits

of the firm, for that settlement had been made under the directions of the Alien Property Custodian. He also interposed an objection to the payments made under that settlement upon the first accounting before the Surrogate in 1919, and expressly withdrew that objection in May, 1921. Thus, long before the commencement of this suit in this court the Alien Property Custodian was fully advised of all the facts on which the Supreme Court for New York County on full consideration finally held in 1933 that the Irving Trust Company as executor of said Sielcken was entitled to receive and hold and 914 administer the funds recovered under the said decree herein.

That among the sums received under the said decree and turned over to this executor of Sielcken was $230,000 United States Bonds which had been received from the Treasurer of the United States in part payment of said decree of this Court. $100,000 of these bonds were distributed and turned over by this executor to the residuary legatee under said Will, said Clara Sielcken Schwarz, in 1931, as a partial distribution of the estate of said Hermann Sielcken.

Your petitioner further alleges, on its information 915 and belief, that both said Sorenson and said Nielsen at the time of bringing this suit in this court in 1927, in good faith believed that they were entitled to sue as sole surviving partners of the firm of Crossman & Sielcken, and so did each of the attorneys who appeared for the plaintiffs in this suit.

Your petitioner, on its information and belief, further shows that at the time this suit was brought, and until long after entry of the decree herein of December 30th, 1929, Sorenson and Nielsen and their attorneys in the suit each believed that whatever interest might have been once claimed by the firm of Theodor Wille in the claims asserted by the bill in this case had been wholly satisfied and abandoned, as a result of certain proceedings taken in Germany by the German executors of said Sielcken against the above-named

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Zentral Einkaufs Gesellschaft m.b.H. and of certain agreements entered into between said German executors of Hermann Sielcken, deceased, and members of the firm of Theodor Wille with the said Zentral Einkaufs Gesellschaft; and, as your petitioner is informed and believes, neither said Sorenson nor said Nielsen nor their attorneys, at the time of commencing this suit, or at any time prior to March, 1930, had any idea that either the said firm of Theodor Wille or the said Zen-
917 tral Einkaufs Gesellschaft had or claimed to have any interest whatsoever in any sum recovered in this suit by the plaintiffs.

Your petitioner further shows that the Attorney-General of the United States has voluntarily appeared in proceedings for an accounting by this executor of the said estate now pending in the Surrogate's Court for the County of New York and has therein filed a so-called objection to the account of this executor, of which a true and correct copy is hereto annexed, marked Exhibit F, and hereby made a part of this petition.

Your petitioner further shows that in the early part of the year 1927, your petitioner, believing that it had
918 fully liquidated the American estate of said Hermann Sielcken, rendered a full, final, extra-judicial, voluntary account of its administration of the estate to said Clara Sielcken Schwarz, the sole residuary legatee and the only person then interested in the estate other than this executor, and paid and distributed to her the full amount of the estate then remaining in the executor's hands, believing that the estate had thereby been fully wound up.

Thereafter and in May, 1927, said Clara Sielcken Schwarz, then the only person interested in the estate other than this executor, advised this executor that she had discovered certain additional assets of the firm of Crossman & Sielcken which had been until then wholly unknown to this executor, and which were not shown on the firm books of Crossman & Sielcken or in its files, consisting of the claim asserted in this suit and

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a certain other claim which was asserted before the Mixed Claims Commission.

Without revealing to the executor the exact nature of these claims, Mrs. Sielcken Schwarz then arranged with the executor (which then held no funds available for the purpose) that she would prosecute such claims at her own expense and costs and by such attorneys as she might employ for that purpose, either in the name of the executor or otherwise, as she might be advised; that it was pursuant to that arrangement that she

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brought this suit by her own attorneys in the names of said Nielsen and said John S. Sorenson as surviving members of the said former firm of Crossman & Sielcken against the said Zentral Einkaufs Gesellschaft and the Alien Property Custodian and the Treasurer of the United States, and on December 30, 1929, they obtained the said decree of this Court which is now sought to be vacated. This executor took no other part in the proceedings than, upon the request of the said Clara Sielcken Schwarz and her attorneys and their representations that the settlement was an advisable one, and had been already approved by the Government authorities, by Zentral Einkaufs Gesellschaft, by the

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firm of Theodor Wille and by the said Clara Sielcken Schwarz, and their respective attorneys, to approve the compromise arrived at; and that it ultimately received under the judgment of November 11th, 1933, in the State Court action the moneys so recovered less such disbursements as had been made therefrom, all as more fully shown in its pending accounting before the Surrogate for the County of New York, to which the Attorney-General has, on his own application, been made a party; save and except only that under the permission so given to said Clara Sielcken Schwarz this executor was joined as a party by her authority to the two Memorials filed with the Mixed Claims Commission, one with regard to the claim involved in this suit and one with regard to the claim involved in another proceeding before the Mixed Claims Commission against

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the firm of Theodor Wille and the German Government, and a former officer of this petitioner joined Sorenson and Nielsen in verifying such Memorials.

Your petitioner further shows on its information and belief and will produce proofs that the compromise so entered into and approved by it was a compromise of claims made in the said proceeding before the Mixed Claims Commission and approved by the United States Government authorities with the knowledge of the At-
923 torney-General's office.

Your petitioner further shows that there was no fraud on its part in the institution or maintenance of this suit or the recovery therein; and, on its information and belief, that there was no fraud on the part of either the plaintiffs in this suit or any of their attorneys or counsel in bringing the suit as they did.

Your petitioner further shows that if there was an invalidity to the claim asserted by the plaintiffs in this suit it was a matter that should have been asserted by the defendants in the suit; that in fact the Alien Property Custodian and the Treasurer of the United States and the Zentral Einkaufs Gesellschaft by their said
924 answers put in issue the right of the plaintiffs in this suit to maintain the action; that the proofs on that issue were submitted to this Court and were passed upon by it, and the plaintiffs held entitled to maintain the suit as such surviving liquidating partners. Your petitioner is further advised and believes that this question having been adjudged by this court on an issue presented in the cause, and actually tried therein, is conclusive; and even if the decision thereon were erroneous, the same was merely ground for consideration and reversal upon appeal therefrom; and cannot be made the basis of an application to vacate this decree for want of jurisdiction, a rule repeatedly expressed by the Supreme Court of the United States for a century past, holding that a decision by the Trial Court on any question of its jurisdiction of the subject-matter or the capacity of the parties presented to

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it is equally conclusive as any other determination contained in the decree.

Your petitioner further alleges that the issues of the Court's jurisdiction of this cause, and of the capacity of the plaintiffs therein to maintain the suit, were determined by the Court by its said decree of December 30th, 1929, and are conclusive against the present attack on said decree, and cannot now be reopened.

Your petitioner further shows that no notice of the application to vacate the decree herein has been given 926
to your petitioner, although the Attorney-General has been at all times, even before making the application fully aware that your petitioner has a direct interest in property acquired under and by force of the said decree of this Court. On the contrary, the Attorney-General, in giving his notice, has served it only on John S. Sorenson and on the Chase National Bank as alleged Ancillary Administrator of Thorleif S. B. Nielsen; but upon its being shown that said Chase National Bank was never appointed administrator of said Thorleif S. B. Nielsen but was his executor appointed in New Jersey and his ancillary executor appointed in New York, but had been discharged in each capacity after full account- 927
ing by the Courts of New York and New Jersey, consented to the cancellation of its service of notice of this motion on the Chase National Bank; that he has made no attempt to serve any notice on the Treasurer of the United States or on the Zentral Einkaufs Gesellschaft, defendants in this suit, and has avoided giving any notice of the application to your petitioner or putting your petitioner in a position to oppose the said motion.

Your petitioner further shows that the assertions in the affidavit of Mr. Sterck upon which the application to vacate the said decree is based are in many vital respects completely at odds with the actual facts, which your petitioner is ready and prepared to show, to wit, that the Alien Property Custodian never seized the assets of the firm of Crossman & Sielcken, and in particular never attempted to seize the claim that was as-

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serted by the bill of complaint in this suit; that he never declared the firm of Crossman & Sielcken an enemy; that he never declared that Hermann Sielcken was an enemy or attempted to seize his property; that in point of fact he could not, because said Sielcken died prior to the appointment of any Alien Property Custodian and only two days after the passage of the Trading with the Enemy Act; that at the time of the passage of the Trading with the Enemy Act the said Sielcken was on his
929 death-bed, unable to be moved, and died within forty-eight hours of the passage of that Act, at Baden Baden in Germany; that the only thing in the nature of seizure of any property of the firm by the United States was a license granted by the War Trade Board in November, 1917, several weeks after the death of Sielcken, though in ignorance of his death, giving permission to said Sorenson and Nielsen to liquidate the affairs of the firm under supervision of the Alien Property Custodian.

That in and by said license the War Trade Board directed said Sorenson and Nielsen to account to the Alien Property Custodian for the interest of the enemy partner, without designating who the enemy partner
930 was, and in entire ignorance that Hermann Sielcken (who was probably intended) had died over five weeks before the issue of said permit, and in like ignorance that his interest had already vested in his executor.

The Alien Property Custodian by that permit was given power to exercise such supervision by an Agent, and he appointed the Columbia Trust Company as his agent for that purpose on the 30th of November, 1917, over seven weeks after the death of Sielcken.

Less than three weeks later the information came in that Sielcken was dead and thereupon the Columbia Trust Company as executor named in his will presented his will for probate and applied for temporary letters of administration pending probate of the will and also for testamentary letters when probated.

The Surrogate's Court handed down a decision on the 26th day of December, 1917, directing the issue of tempo-

931

rary letters of administration to the Columbia Trust Company, and this Company at once wrote to the Alien Property Custodian, calling attention to the facts and pointing out that there had been no seizure of Sielcken's property and requesting that it, as such temporary administrator and later as executor, should be allowed to go ahead and administer his estate and take charge of the liquidation of the affairs of Crossman & Sielcken pursuant to his will and the Articles of Copartnership.

The Custodian on the 14th day of January, 1918, wrote 932
accepting and acknowledging this situation, but pointing out that it would be necessary for the executor to get a new license from the War Trade Board and that upon doing so it might at once go ahead as temporary administrator and thereafter as executor if so appointed to administer the entire estate, thus withdrawing all prior claims. A copy of such letter of January 14, 1918, is hereto annexed marked Exhibit G.

The War Trade Board thereupon issued new licenses, both to Sorenson and Nielsen and to the Columbia Trust Company as temporary administrator and executor, to proceed with such liquidation, and in doing so cancelled the former permit with its requirement that Sorenson and 933
Nielsen should account to the Alien Property Custodian for the interest of the "enemy partner," substituting therefor a provision, in the new license to Sorenson and Nielsen, "that the licensees shall transfer to the Alien Property Custodian *whenever he shall so require* the whole or any part of the share of said estate of Hermann Sielcken, deceased, in the proceeds of the aforesaid liquidation." That no such provision was contained in the license then given to the Columbia Trust Company as temporary administrator and executor.

The temporary administrator thereupon took over possession of such assets of the firm of Crossman & Sielcken as had previously been taken possession of by it as agent of the Alien Property Custodian, consisting only of various securities, to wit, on the 23rd of January, 1918. Until such appointment of your petitioner as temporary administrator, the actual liquidation of the firm had been

934 *Petition of Irving Trust Company as Executor for Leave to Intervene in Proceedings to Vacate*

conducted by said Sorenson and said Nielsen as the partners in possession.

Your petitioner further shows that thereafter, in October, 1918, the Alien Property Custodian declared that Clara Sielcken Schwarz and certain German legatees specifically named in the will of Herman Sielcken were enemies and demanded of this Executor that their respective shares in the estate of said Hermann Sielcken be paid to him in place of to them; thus abandoning any
935 claim he might previously have suggested, though not formally made, to any assets of the firm or of the estate of Herman Sielcken. The chief of the legatees so named in this demand was Clara Sielcken Schwarz, the widow of said Herman Sielcken and residuary legatee of his estate. All rights of other persons named as enemies in said demand lapsed.

Said Clara Sielcken arrived in New York in October, 1919, and thereupon made application to the Alien Property Custodian for the release of her interest under the will of Herman Sielcken and also for the release of various other property, belonging to her individually, which the Custodian had seized; she claimed that said Hermann
936 Sielcken had been naturalized as an American citizen and that she was, therefore, an American citizen and was entitled, now that she had returned to this country, to recover her property and her interests in his estate from such seizure. Objection was raised by the Alien Property Custodian on the score that there was no record of naturalization of the said Hermann Sielcken. She thereupon brought a suit in California to re-establish the record of naturalization of said Hermann Sielcken under California law on a claim that such record had been destroyed in the San Francisco fire and earthquake.

In that proceeding the Alien Property Custodian appeared and contested, but the Court, after full hearing, restored the record by decree, and the Alien Property Custodian thereupon appealed from that decree, and on appeal the same was affirmed.

After affirmance of said decree in April, 1921, the Alien Property Custodian and the Attorney General released

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entirely the claim to take over the interest of said Clara Sielcken (now Clara Sielcken Schwarz) in the estate of Hermann Sielcken and also released her individual property which had been seized by the Alien Property Custodian, and at the same time the Alien Property Custodian notified this executor that it could proceed with the administration and distribution of the estate just as if the Alien Property Custodian had never demanded the interest of said Clara Sielcken; and shortly thereafter he withdrew the objections he had filed to the first account of the executor and afterwards was cited upon the second account of the executor, on which accountings decrees were entered showing and establishing the release of said claims of the Alien Property Custodian and that large sums, amounting to considerably over one million dollars had been distributed by the Executor to Mrs. Sielcken as residuary legatee.

938

Your petitioner is further prepared to produce evidence, practically conclusive, that at the time of instituting this suit and of presenting that claim under the Trading with the Enemy Act to recover, the plaintiffs in this action did not know nor believe that the executor was the sole owner of the alleged debt, which was the basis of the claim or of this suit, and your petitioner is prepared to question the assertion in the moving affidavit that the executor was precluded by law from maintaining such a suit by reason of the facts in the case.

939

Your petitioner also desires to deny all the allegations in paragraph numbered 4 of the affidavit of the said Sterck, and present proofs that the merchandise in question did not belong in equal undivided shares to the firms of Crossman & Sielcken and Theodor Wille respectively; and that the shipment and sale thereof was not for their joint account or a joint venture.

Your petitioner also alleges on its information and belief, and desires to show, that the compromise agreement entered into before the Mixed Claims Commission was made on ample information to the Attorney General and the Alien Property Custodian and was approved by them, and that it was a compromise that did not grow out of the

940 *Petition of Irving Trust Company as Executor for Leave to Intervene in Proceedings to Vacate*

claim asserted by the bill of complaint in this suit but was a compromise of other subsequent claims, which could be asserted in Germany against the ample German estate of said Hermann Sielcken, which was also bequeathed to said Clara Sielcken Schwartz, and that the arrangements for using funds recovered by the decree in this case was simply a matter of convenience of using funds immediately available instead of funds which came in four or five weeks later under the award of the Mixed Claims Commission exceeding all sums paid under the compromise;
941 also that the payments made pursuant to said compromise were fully known to the United States Government and to the Attorney General and were made with their approval.

Your petitioner has no knowledge or information sufficient to form a belief concerning the allegations as to the conduct of the suit on behalf of the Zentral Einkaufs Gesellschaft.

Your petitioner is further informed and believes that the tentative agreements made in Berlin in March, 1928, were not for a compromise of the claim asserted in this cause but were negotiations for a compromise of other
942 claims asserted before the Mixed Claims Commission; and, as far as your petitioner is informed and believes, all suggestions concerning the use of the funds recovered under this judgment for effecting the compromise agreed to of the claims before the Mixed Claims Commission, were made subsequent to the entry of the final decree herein, and that such final decree was not predicated thereon.

Your petitioner further shows that the moving papers presented by the Attorney General on this application are very extensive, some 240 pages in length, and are replete with errors of fact and of law; that the preparation of answering papers showing the exact status of affairs will take a very considerable amount of time; that several persons from whom it will be necessary to procure affidavits are not at present within the State of New York and will not return for some days, and that a reasonable time is necessary to prepare a full record showing the entire situation.

Your petitioner further shows that no appeal has ever been taken from such final decree of December 30, 1929, that no motion for a new trial was ever made in this cause nor has any bill of review ever been brought to review such decree; that the final decree of this court is, as your petitioner is informed and believes, conclusive against the claims now sought to be raised and is not subject to any attack of the present character; that if the Attorney General claims that the decree was obtained by fraud perpetrated on the court, his proper method of application is by a bill to review on the ground of fraud 944
perpetrated by the plaintiffs; that the Supreme Court of the United States in the case of United States v. Throckmorton, 98 U. S. 61, held, many years ago, that a bill of review containing just as complete allegations as the Attorney General makes in this case, was fatally defective in substance and sustained a demurrer thereto; that the equivalent of every allegation made in this case was made in that case, and the Court held those allegations insufficient to justify opening the decree on the ground of fraud on the court.

Other decisions of that court establish fully the rule that the fact that the matter here sought to be attacked is a 945
finding that the Court had jurisdiction, does not alter the rule so established in the Throckmorton case.

Your petitioner is further informed and believes that the motion of the Attorney General to vacate the said decree is now expected to appear on the motion calendar of this Court for the 21st day of June, 1938.

No previous application has been made by your petitioner for any order to show cause or stay of any kind in this suit.

Wherefore your petitioner prays that it be allowed to intervene on this application to vacate said decree of December 30th, 1929, and defend against this motion to vacate the same as one who has acquired interests under the decree sought to be vacated and is entitled to be heard on any application to vacate the same; that it be allowed to do so without any prejudice by reason of the fact that it prays to intervene instead of having been originally

946 *Petition of Irving Trust Company as Executor for Leave to Intervene in Proceedings to Vacate*

cited by the Attorney General upon the motion; that it be allowed a reasonable time, not less than twenty days, in which to prepare answering papers on the motion; and for such other and further relief in the premises as may be just.

And your petitioner further prays that the hearing and determination of such motion to vacate the said decree be stayed until your petitioner has opportunity to present its answer to the claims made by the Attorney General, and
947 to be heard on the application.

LEONARD B. SMITH AND SELDEN BACON,
Attorneys for Petitioner,
Office & Post Office Address,
15 Broad Street,
Borough of Manhattan,
New York City, New York.

State of New York,
County of New York,
Southern District of New York,

Paul E. Mead, being duly sworn, deposes and says:

948 That he is a Vice President of the Irving Trust Company, the abovenamed petitioner; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes them to be true; that this verification is made by him as an officer of the Irving Trust Company because it is a corporation and cannot itself verify this petition; that he as such officer who has had supervisory charge for several years past of the administration of the estate of said Hermann Sielcken; that the sources of his information and the grounds of his belief as to the allegations made on information and belief are the records and files in the various suits and actions referred to in the foregoing petition, the records and files of the Irving Trust Company, and the information derived from its own attorneys who appeared for it in the said action of the Chase National Bank vs. Sorenson and this executor and others, and who conducted that and other

Petition of Irving Trust Company as Executor for Leave to Intervene in Proceedings to Vacate 949

litigation for this petitioner involving the history of these matters, and from their examination of the records in the Alien Property Custodian's office and in the files of the Mixed Claims Commission and in the other proceedings mentioned in said petition; and indirectly from the above-named John S. Sorenson, and from the attorneys who conducted the present suit on behalf of the plaintiffs therein, and deponent believes said allegations to be true as alleged.

PAUL E. MEAD. 950

Sworn to before me this
16th day of June, 1938.
M. Paul,
M. Paul, Notary Public, Kings Co.
Kings Co. Clk. No. 5, Reg. No. 108
Certificate filed in N. Y. Co. Clk. No.
42, Reg. No. 0-P-29
Queens Co. Clk. No. 331, Reg. No. 1962
Bronx Co. Clk. No. 8, Reg. No. 49-P-40
Westchester Co. Suffolk Co. Nassau Co. 1-p-40
Commission expires March 30, 1940.

(Notarial Seal) 951

952 **Exhibit A of Petition for Leave to Intervene.**

Bill of Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken, 953 Plaintiffs, against HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUF-GESELLSCHAFT, m. b. H., Defendants.	Equity No. 44-28.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, sitting in Equity:

954 John S. Sorenson, a citizen of the State of New York, residing in the City, State and Eastern District of New York, and Thorleif S. B. Nielsen, a citizen of the State of New Jersey, residing in the City of Hackensack, State and District of New Jersey, as surviving partners of the firm of Crossman & Sielcken, residing in the City, State and Southern District of New York, bring this, their bill of complaint against Howard Sutherland, as Alien Property Custodian, duly qualified and acting under the Trading with the Enemy Act, as amended, Frank White, as Treasurer of the United States, and Zentral-Einkaufsgesellschaft, m. b. H., a corporation organized under the laws of Germany, with its last known principal place of business in Berlin, Germany, and allege and show:

FIRST: At all the times hereinafter mentioned the plaintiffs, John S. Sorenson and Thorleif S. B. Nielsen, and one Hermann Sielcken, all being citizens and residents of the United States, were engaged in business as exporters, importers and commission merchants, as copartners doing business under the firm name and style of Crossman & Sielcken, and said partnership continued its said business in regular course, up to the date of the death of said Hermann Sielcken, as hereinafter set forth.

SECOND: Said partnership of Crossman & Sielcken at all times has had its principal place of businesss in 956
the Borough of Manhattan, City, State and Southern District of New York, and has been and is a resident of said Borough of Manhattan, City and State of New York, and has not at any time been a resident within territory (including that occupied by the military and naval forces) of any nation with which the United States was at war and was not, nor at any time has it been, an enemy or ally of enemy within the meaning and purview of those terms as used and defined in the Act of October 6, 1917, known as and herein referred to as the Trading with the Enemy Act, or in any act amendatory thereof and supplemental thereto or in any proclamation 957
or executive order issued by the President of the United States pursuant to Subsection (c) of Section 2 of said Trading with the Enemy Act.

THIRD: The defendant, Howard Sutherland, is a citizen of the United States, and is the duly appointed and qualified Alien Property Custodian, and has his official residence in the City of Washington, District of Columbia.

FOURTH: The defendant, Frank White, is a citizen of the United States and is the duly appointed and qualified Treasurer of the United States and has his official residence in the City of Washington, District of Columbia.

FIFTH: Upon information and belief, the defendant, Zentral-Einkaufsgesellschaft, m. b. H., hereinafter re-

958 *Exhibit A of Petition for Leave to Intervene*

ferred to as Z. E. G., is a corporation organized in or about the month of January, 1915, under the laws of Germany with its principal place of business in the City of Berlin, Germany, and succeeded to and took over all of the business, assets and liabilities of the enterprise theretofore operated by the Reichseinkauf, which was a purchasing agency of the then Imperial German Government, having its principal place of business in the City of Berlin, Germany.

SIXTH: This bill is filed pursuant to the provisions
959 of Section 9 of the Trading with the Enemy Act, as amended, and this court has jurisdiction to entertain the same under the express terms of said section, as amended.

SEVENTH: On or about the 24th day of September, 1914, the said Reichs-einkauf entered into an agreement with said Crossman & Sielcken, under the terms of which said firm was employed to purchase for account of said Reichseinkauf mixed cargoes of wheat, tea, cocoa and mixed animal feed, to be shipped by neutral vessels from American ports to neutral Baltic ports and said firm of Crossman & Sielcken was to be reimbursed for
960 the invoice price, plus freight and insurance, and to be paid a commission of 10% on the value of the cargo as indicated by the total amount of the invoice, freight and insurance.

EIGHTH: Thereafter said Reichseinkauf and its said successor, Z. E. G., instructed said Crossman & Sielcken to stop shipments of wheat and flour and in their place to purchase pure lard, fat backs, near backs, short backs, clear backs, cakes and cereals.

NINTH: Thereafter and between, on or about February 27, 1915, and April 28, 1915, pursuant to said agreement and instructions, certain merchandise of the character above mentioned was purchased by said Crossman & Sielcken for account of Z. E. G. and was shipped in the vessels listed below, consigned to Harry Levin or

Beckmann & Jorgensen, agents of Z. E. G. at Copenhagen, Denmark:

SS Hilding, sailed February 27, 1915, consigned to Harry Levin,

SS Arkansas, sailed March 23, 1915, consigned to Harry Levin,

SS Hellig Olav, sailed March 30, 1915, consigned to Harry Levin,

SS Gunborg, sailed April 23, 1915, consigned to Harry Levin,

SS Indianic, sailed April 23, 1915, consigned to Beck- 962
mann & Jorgensen,

SS Oscar II, sailed April 28, 1915, consigned to Beckmann & Jorgensen.

Said shipments were seized by the British naval authorities and were condemned in the British Prize Court as lawful prizes and said Crossman & Sielcken have not been reimbursed for the invoice value of said cargoes, insurance and freight nor paid any part of their 10% commission on said shipments except for a payment on account of certain crackers and cereals on said SS Oscar II.

TENTH: The invoice value, including freight and 963
insurance, upon said cargoes, together with the amount of commission due said Crossman & Sielcken thereon pursuant to said agreement, amounted to the sum of $388,811.98, and the payment made to said Crossman & Sielcken on account of said crackers and cereals on SS Oscar II, amounted to $8,050.44, leaving a balance due the said partnership of Crossman & Sielcken from Z. E. G. of $380,761.54, with interest on $84,472.08 thereof from April 17, 1915; on $105,135.12 thereof from April 27, 1915; on $83,938.02 thereof from May 11, 1915; on $48,396.88 thereof from June 13, 1915, and on the remaining $58,818.44 thereof from June 23, 1915, no part of which has been paid.

ELEVENTH: On or about the 8th day of October, 1917, the said Hermann Sielcken died leaving the plain-

964 *Exhibit A of Petition for Leave to Intervene*

tiffs the only surviving partners of the said firm of Crossman & Sielcken and said partnership pursuant to Section 61 of the Partnership Law of the State of New York, thereafter continued for the purpose of winding up its affairs and this suit is brought pursuant to said purpose and to enforce the rights given said partnership under Section 9, Subdivision (a) of the Trading with the Enemy Act, as amended.

TWELFTH: Upon information and belief the defendant, Howard Sutherland, as Alien Property Custodian,
965 and Frank White, as Treasurer of the United States, now hold property and/or money in a Trust designated No. 592, approximating $669,155.00, which was heretofore conveyed, transferred, assigned, delivered or paid to the then Alien Property Custodian or seized by him under the provisions of the Trading with the Enemy Act as property and/or money owned or belonging to or held for, by, on account of or in behalf of, or for the benefit of said Z. E. G., which became and was and now is an enemy within the meaning and purview of that term as used and defined in the Trading with the Enemy Act.

966 THIRTEENTH: On or about the 12th day of November, 1927, the plaintiffs as surviving partners of said firm of Crossman & Sielcken, duly made and filed with the Alien Property Custodian a notice of their claim, under oath, in the form and containing the particulars required by said Custodian, in conformity with the provisions of Section 9 of the Trading with the Enemy Act, as amended, and have made no application to the President of the United States to order the payment, conveyance, transfer, assignment or delivery to the plaintiffs, or said property and/or money or of any portion thereof and the President has made no such order.

For as much as the plaintiffs cannot have adequate relief except in this court and to the end that the defendants may make full disclosure and discovery of the matters aforesaid and full, true and perfect answer

make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, the plaintiffs submit their rights in the premises to this Honorable Court and pray that this Court enter its decree herein establishing the debt claimed by the plaintiffs to be due and owing the said partnership of Crossman & Sielcken from the defendant Z. E. G. and ordering the payment thereof to the plaintiffs as surviving partners of said firm of Crossman & Sielcken by defendants, Howard Sutherland and Frank White, out of the property and/or money held by them to the 968 credit of Trust No. 592, in the name of said Z. E. G.

May It Please Your Honors to grant to the plaintiffs a writ of subpoena of the United States of America directed to said Howard Sutherland as Alien Property Custodian and to said Frank White, as Treasurer of the United States and to said Zentral-Einkaufsgesellschaft, commanding them on a day certain to appear and answer to this bill of complaint and obey and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

EARL B. BARNES, 969
BRAINARD AVERY,
Solicitors for the Plaintiffs,
Office and Post Office Address,
No. 100 Broadway,
Borough of Manhattan,
New York City.

Charles D. Hamel,
Richard S. Doyle,
Counsel,
906 Southern Bldg.,
Washington, D. C.

970 **Exhibit B of Petition for Leave to Intervene.**

Answer of Defendant Zentral Einkaufs Gesellschaft, m. b. H.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

971 JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUF-GESELLSCHAFT, m. b. H.,
Defendants.

Equity No. 4428.
Answer.

Answer.

972 Defendant, Zentraleinkaufsgesellschaft, m. b. H., does hereby through Arthur Garfield Hays, its solicitor, for an answer to the complaint herein, respectfully show to the court:

1. Defendant admits that prior to the outbreak of war between the United States and Germany on April 6th, 1917, John S. Sorenson, Thorleif S. B. Nielsen and one Hermann Sielcken were engaged in business as exporters, importers and commission merchants, as co-partners doing business under the firm name and style of Crossman & Sielcken, but except as herein specifically admitted, denies each and every allegation contained in paragraph marked or numbered "First" of the complaint.

2. Defendant admits that the said partnership of Crossman & Sielcken at all times had its principal place of

business in the Borough of Manhattan, City, State and Southern District of New York, but except as herein specifically admitted, denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph marked or numbered "Second" of the complaint.

3. Defendant denies each and every allegation contained in paragraphs marked or numbered "Seventh" and "Eighth" of said complaint.

4. Answering paragraph "Ninth," defendant admits 974
that Crossman & Sielcken have not been reimbursed for the invoice values of the cargoes referred to therein, plus insurance and freight, nor paid any commission thereon, and that shipments were made on the vessels therein named; denies knowledge or information sufficient to form a belief as to the allegations that the shipments referred to therein were seized by the British Naval authorities and were condemned in the British Prize Court as lawful prizes; and, except as herein specifically admitted, denies each and every allegation contained in said paragraph marked or numbered "Ninth" of said complaint.

5. Defendant is without knowledge as to the aver- 975
ments of Paragraph "Tenth" of the bill of complaint and therefore demands strict proof thereof.

6. Defendant admits that said Hermann Sielcken died on or about the 8th day of October, 1917, but denies each and every other allegation contained in paragraph marked or numbered "Eleventh" of said complaint.

7. Defendant admits that a large sum of its money was heretofore conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian or seized by him under the provisions of the Trading with the Enemy Act, as property and/or money owned or belonging to or held for, by, on account of, or in behalf of, or for the benefit of the defendant, and that the defendant on the outbreak of war became an enemy within the meaning and purview of that term as used and defined in the Trading

976 *Exhibit B of Petition for Leave to Intervene*

with the Enemy Act; but denies that it has any knowledge or information sufficient to form a belief as to each and every other allegation contained in paragraph marked or numbered "Twelfth" of said complaint.

8. Defendant denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph marked or numbered "Thirteenth" of said complaint.

FOR A FIRST SEPARATE AND DISTINCT DEFENSE, DEFENDANT
977 ALLEGES, ON INFORMATION AND BELIEF:

1. The defendant, Zentraleinkaufsgesellschaft, hereinafter referred to as "Z. E. G.," is a corporation organized in or about the month of January, 1915, under the laws of Germany, with its principal place of business in the City of Berlin, Germany, and succeeded to and took over all of the assets and liabilities of the enterprise theretofore operated by Reichseinkauf, which was the purchasing agency of the then Imperial German Government, having its principal place of business in the City of Berlin, Germany.

978 2. That on or about the 25th day of September, 1914, one Richter, acting on behalf of the said Reichseinkauf, in Hamburg, notified one Hermann Sielcken, now deceased, then a member of the firm of Crossman & Sielcken, that the Reichseinkauf had been commissioned to receive in Baltic seaports, mixed cargoes of certain foodstuffs shipped by vessels of neutral nations from American ports to neutral ports of the Baltic sea, and that the Reichseinkauf would pay for such cargoes the value, C. I. F. Baltic seaport (*i. e.*, the value of the invoice plus freight and insurance expenses), and ten (10%) per cent, commission on this value; payment to be made on the arrival of the goods and delivery of the bills of lading at the port of destination. A copy of such notification in translation is attached hereto, marked Exhibit "A."

3. Thereafter the Z. E. G. having succeeded the Reichseinkauf, notified the said Hermann Sielcken to stop shipments of wheat and flour and asked him to request his friends to purchase other merchandise.

4. Pursuant to the aforesaid notification, the firm of Crossman & Sielcken shipped on the vessels listed below, consigned to Harry Levin or Beckmann & Jorgensen, at Copenhagen, Denmark, the following:

s/s "Hilding."	Sailed February 27, 1915
	Consigned to Harry Levin 980
s/s "Arkansas."	Sailed March 23, 1915
	Consigned to Harry Levin
s/s "Hellig Olav."	Sailed March 30, 1915
	Consigned to Harry Levin
s/s "Gunborg."	Sailed April 23, 1915
	Consigned to Harry Levin
s/s "Indianic."	Sailed April 23, 1915
	Consigned to Beckmann & Jorgensen
s/s "Oscar II."	Sailed April 28, 1915
	Consigned to Beckmann & Jorgensen.

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5. The said shipments did not arrive in any Baltic seaport, and neither the goods nor the bills of lading were delivered to the defendant at the point of destination.

FOR A SECOND SEPARATE AND DISTINCT DEFENSE, DEFENDANT ALLEGES, ON INFORMATION AND BELIEF:

6. Defendant Z. E. G. realleges each and every allegation contained in paragraph marked and numbered 1, 2, 3, 4 and 5 of the First Separate and Distinct Defense, the same as if more specifically set forth herein.

7. That it was specifically agreed between the parties that title to and property in the said goods should at all times until actual delivery of the goods, remain in the firm of Crossman & Sielcken.

982 *Exhibit B of Petition for Leave to Intervene*

FOR A THIRD SEPARATE AND DISTINCT DEFENSE, DEFENDANT ALLEGES, ON INFORMATION AND BELIEF:

8. Defendant realleges each and every allegation contained in paragraphs marked or numbered 1, 2, 3, 4 and 5 of the First Separate and Distinct Defense, the same as if more specifically set forth herein.

9. That the said notification, marked Exhibit "A," was given in Germany; that the German law applies, and that under the law of Germany as it existed in the
983 year 1914 and subsequently, the said notice constituted a mere offer which would be accepted and become a binding contract only by actual delivery of the goods and delivery of the bills of lading at a neutral port of the Baltic sea.

FOR A FOURTH SEPARATE AND DISTINCT DEFENSE, DEFENDANT ALLEGES, ON INFORMATION AND BELIEF:

10. Defendant realleges each and every allegation contained in paragraph marked or numbered 1, 2, 3, 4 and 5 of the First Separate and Distinct Defense and paragraph marked or numbered 7 of the Second Separate
984 and Distinct Defense, the same as if more fully set forth herein.

11. That under the law of Germany, title to the goods and property in the goods were in the plaintiff and the risk of loss was to be borne by the plaintiff herein.

FOR A FIFTH SEPARATE AND DISTINCT DEFENSE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF:

12. Defendant realleges each and every allegation contained in paragraphs marked or numbered 1, 2, 3, 4 and 5 of the First Separate and Distinct Defense, as if more specifically set forth herein.

13. That the firm of Crossman & Sielcken was composed of John S. Sorenson, Thorleif S. B. Nielsen and

Hermann Sielcken. That at the outbreak of war between the United States and Germany, to wit, April 6th, 1917, the said Hermann Sielcken resided in Germany and became an alien enemy.

14. That the firm of Crossman & Sielcken was dissolved by the outbreak of war.

15. That thereafter and in October, 1917, pursuant to the Trading with the Enemy Act, the said firm of Crossman & Sielcken was declared an enemy firm and all of its assets were turned over to and/or were seized by the Alien Property Custodian of the United States.

16. That title to the said assets of Crossman & Sielcken was thereafter held by the Alien Property Custodian, as trustee, and that the Alien Property Custodian never returned or otherwise released said assets to the firm of Crossman & Sielcken, or to the plaintiffs as surviving partners of said firm, and the plaintiffs have no title to the alleged cause of action set forth in the complaint herein.

FOR A SIXTH SEPARATE AND DISTINCT DEFENSE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF:

17. Defendant realleges each and every allegation contained in paragraphs marked and numbered 1, 2, 3, 4 and 5 of the First Separate and Distinct Defense and paragraphs marked and numbered 13 and 14 of the Fifth Separate and Distinct Defense, as if more specifically set forth herein.

18. That in or about the month of October, 1917, said Hermann Sielcken died in Germany leaving a last will and testament dated February 18, 1917, in which he named as testamentary executors Carl Isenberg, Richard Isenberg, G. Georgius and Gustav Diederichsen.

19. That said last will and testament was duly probated in Germany, and the above-named duly qualified as executors of Hermann Sielcken and took charge of all assets of the deceased in Germany.

988 *Exhibit B of Petition for Leave to Intervene*

20. That the dissolution of the firm of Crossman & Sielcken having come about through the outbreak of war between Germany and the United States, the partner residing in Germany, to wit, Hermann Sielcken, was entitled to the possession and control of all assets of the firm then in Germany, and that the executors of said Sielcken succeeded to his rights.

21. That any claim by reason of the facts alleged in the complaint was a claim in Germany during the war, and that the plaintiffs had no interest therein, nor have
989 they since acquired any interest therein.

22. That on or about the 27th day of December, 1917, the said executors entered into an agreement with the defendant Z. E. G. to arbitrate the question of whether or not the risk of loss on the cargoes referred to in the complaint herein, as well as a cargo on the s/s "United States," rested upon the plaintiffs or the defendant Z. E. G., a copy of said contract of arbitration being attached hereto, marked Exhibit "B."

23. That said arbitration was duly proceeded with and the parties entered an appearance before the Board of Arbitration, and that said Board of Arbitration on or
990 about the 31st day of May, 1918, concluded that the risk of loss in connection with all cargoes, except those on the s/s "United States" and s/s "Hellig Olav," was on the firm of Crossman & Sielcken, and that the defendant herein was under no liability for said shipments, and as respects the cargoes on the above two vessels, the said Board of Arbitration requested further information.

FOR A SEVENTH SEPARATE AND DISTINCT DEFENSE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF:

24. Defendant realleges each and every allegation contained in paragraphs marked and numbered 1, 2, 3, 4 and 5 of the First Separate and Distinct Defense and paragraphs marked and numbered 13 and 14 of the

Fifth Separate and Distinct Defense, and paragraphs marked and numbered 18, 19, 20, 21, 22 and 23 of the Sixth Separate and Distinct Defense, as if more specifically set forth herein.

25. That thereafter and in or about July, 1928, the parties to the said arbitration settled all questions concerning the matter through an agreement pursuant to which Z. E. G. bore one-fourth of the expense of the arbitration, instead of one-thirteenth as fixed by the Board of Arbitration, and the above named executors bore three-fourths of the expense, instead of twelve-thir- 992
teenths as fixed by said Board of Arbitration; and, in addition thereto, it was agreed that Hermann Sielcken, his estate, and/or the firm of Crossman & Sielcken should retain monies theretofore paid by the Z. E. G. on account of the shipment on the s/s "United States."

26. That the said executors of the estate of Hermann Sielcken in Germany, agreed to and approved the said settlement; that said proportions of the cost of arbitration were paid as agreed, and the firm of Crossman & Sielcken and/or Hermann Sielcken, or his estate, retained and still continues to retain monies received from the shipment on the s/s "United States"; that the 993
plaintiffs herein did not promptly repudiate the settlement, nor have they ever repudiated the same, nor have either the said executors or the plaintiff ever put the parties in the same position that they would have been in had the agreement of settlement not been made.

27. That the said Hermann Sielcken owned all the assets of Crossman & Sielcken; that the estate of Hermann Sielcken succeeded to all assets thereof and the plaintiffs are estopped from making the claim set forth herein.

FOR AN EIGHTH SEPARATE AND DISTINCT DEFENSE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF:

28. Defendant realleges each and every allegation contained in paragraphs marked and numbered 1, 2, 3, 4

994 *Exhibit B of Petition for Leave to Intervene*

and 5 of the First Separate and Distinct Defense, the same as if specifically set forth herein.

29. That the firm of Crossman & Sielcken had a joint account with the firm of Theodore Wille & Company, of Hamburg, Germany, in connection with the aforesaid shipments, according to the terms of which Theodore Wille & Company would have an equal interest in the said shipments with the firm of Crossman & Sielcken.

30. That Theodore Wille & Company are a necessary
995 party to this action.

FOR A NINTH SEPARATE AND PARTIAL DEFENSE, DEFENDANT ALLEGES ON INFORMATION AND BELIEF:

31. Defendant realleges each and every allegation contained in paragraphs marked and numbered 1, 2, 3, 4 and 5 of the First Separate and Distinct Defense, the same as if specifically set forth herein.

32. That the plaintiffs have been damaged if at all to the extent of only one-half the aforesaid claim.

WHEREFORE defendant Z. E. G. demands judgment that
996 the Bill of Complaint herein be dismissed, together with the costs of this action.

ARTHUR GARFIELD HAYS,
Solicitor for Defendant,
Zentraleinkaufsgesellschaft, m. b. H., (Z. E. G.),
Office & P. O. Address:
43 Exchange Place,
Borough of Manhattan,
New York City.

Exhibit B of Petition for Leave to Intervene 997

Exhibit "A."

TRANSLATION

COPY

EXHIBIT 3. GERMAN

ENCLOSURE A

AGREEMENT

Berlin, W. 8 September 25th, 1914.

I herewith conform to Your Honor, that the "Reichs- 998
einkauf" (Imperial or Government Purchase) in Hamburg has been commissioned to receive, in Baltic seaports, mixed cargoes of wheat, tea, cocoa and high concentrated animal food, which are shipped by vessels of neutral nations from American ports to neutral ports of the Baltic Sea; the value of each cargo amounting up to about 600,000 Marks. The "Reichseinkauf" will, for such cargoes, pay the value of the cargo C.I.F. Baltic seaport (*i. e.* the value of the invoice plus freight and insurance expenses) and 10% commission on this value. Payment to be made on the arrival of the goods and delivery of the bills of lading at the port of destination. 999
This also refers to whole steamer cargoes of high concentrated animal food (oil cakes, cotton seed cakes, etc.).

The confirmation can be cancelled by us at any time and expires of itself on the proclamation of peace. Cargoes, which are on their way, are in such cases to still be received, and also goods, which have been contracted for shipment, as well as goods, which have previously been purchased and ordered for the purposes of this contract.

(Signed) RICHTER

1000 *Exhibit B of Petition for Leave to Intervene*

Exhibit "B."

TRANSLATION

(Stamp) No. 198
2 M 50 PF. pr. 2 Expl.
Jan. 3, 1918
Sgd. Signature

Contract of Arbitration

1001 Between the firm of Crossman & Sielcken, New York, and the Central Purchasing Corporation, Berlin, there exist differences concerning the winding up of transactions which were carried out under an agreement between the parties arrived at in September/October, 1914. The matter has to do with shipments from New York to Copenhagen, which the firm of Crossman & Sielcken arranged for the Z.E.G. in March/April, 1915, with the steamers "United States," "Arkansas," "Hellig Olav," "Oscar II," "Indianic," "Hilding," "Gunborg." Concerning these shipments, of which the first four arrived in Copenhagen but were returned to England and the
1002 last three were seized in England, the parties are in dispute as to who shall bear the risk of the voyage and whether or not these shipments are to be paid for by the Z.E.G.

It has been agreed that these disputes shall be decided by a court of arbitration. Each party shall appoint an arbiter; Reichsgerichtsrat Dr. F. Philippi is appointed as 3. arbiter and chairman. The District Court at Hamburg shall have exclusive jurisdiction for all court actions which may become necessary.

It has been agreed that only one of the shipments captured and brought directly to England and one brought to Denmark but later returned to England, shall be submitted to the court of arbitration, with the provision that the parties will recognize the decision of the court of arbitration as binding for the other above mentioned shipments.

Exhibit B of Petition for Leave to Intervene 1003

The Z.E.G. shall be plaintiff and bring suit for the establishment of its rights. The suit shall be directed against the estate of Hermann Sielcken, represented by the executors, Messrs. G. Diederichsen, G. Georgius, Carl Isenberg and Richard Isenberg.

Berlin, December 27, 1917

CENTRAL PURCHASING CORPORATION
with limited liability
(Zentral-Einkaufsgesellschaft
mit beschrankter Haftung) 1004

Sgd. Signature

Sgd. Signature

Hamburg,
Dec. 31, 1917.

Sgd. D. A. Kaemmerer

For the executors of the

Estate of Herm. Sielcken.

The correctness of the above copy is certified. 1005

Berlin, January 16, 1928.

(Seal) Signature

Assessor.

State of New York,
County of New York, ss:
Southern District of New York,

Arthur Garfield Hays, being duly sworn, deposes and says that he is the solicitor for the defendant Zentral-einkaufsgesellschaft, m. b. H. (Z.E.G.), in the above entitled action. That he resides at 24 East 10th Street and has his office at 43 Exchange Place, in the Borough of Manhattan, City, County and State of New York. That he has read the foregoing answer and knows the

1006 *Exhibit B of Petition for Leave to Intervene*

contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true. That the reason why this verification is made by deponent and not by the defendant Z.E.G. is that the defendant is a foreign corporation, having its office and principal place of business in Berlin, Germany; that none of the officers of said defendant corporation is within the City, County and State of New York and the jurisdiction of this court,
1007 where deponent resides and has his office. That the source of his information and the grounds of his belief as to all matters alleged herein on information and belief are letters, papers, documents and exhibits in deponent's possession concerning the issues of this action and conferences with agents of the said defendant.

ARTHUR GARFIELD HAYS.

Sworn to before me this
6th day of August, 1929.
Albert E. Kane,
Notary Public,
New York Co. Clerk's No. 14, Reg. No. 0-54.
1008 Commission expires March 30th, 1930.

Exhibit C of Petition for Leave to Intervene. 1009

Motion to Dismiss and Answer to the Bill of Complaint of Defendants Sutherland and Alien Property Custodian and White as Treasurer.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUF-GESELLSCHAFT, m. b. H., Defendants. 1010 Equity 4428.

Motion to Dismiss and Answer to the Bill of Complaint.

I.

MOTION TO DISMISS. 1011

Now come the defendants, Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, separately and severally moving to dismiss the bill of complaint and as grounds for their separate and several motions assign the following:

(1) It appears affirmatively from the averments of the bill of complaint that no debt is owing to the plaintiffs from any enemy whose money or other property has been conveyed, transferred, assigned, delivered or paid to the Alien Property Custodian, and/or the Treasurer of the United States, and is now held by the Alien Property Custodian, and/or the Treasurer of the United States.

(2) It appears affirmatively from the averments of the bill of complaint that no debt is owing to the plaintiffs by the Zentral Einkaufsgesellschaft, m. b. H.

1012 *Exhibit C of Petition for leave to Intervene*

(3) Plaintiffs have not stated facts sufficient to entitle them to equitable relief under the provisions of the Trading with the Enemy Act.

II.

ANSWER.

And now not waiving the many defects and insufficiencies of the bill of complaint, but insisting upon each and all of the objections thereto hereinbefore set forth,
1013 these defendants for their separate and several answer to the bill of complaint separately and severally say:

(1-2) That they are without knowledge as to the averments of the paragraphs numbered First and Second of the bill of complaint, and therefore demand strict proof thereof.

(3-4) They admit the averments of paragraphs numbered Third and Fourth of the bill of complaint.

(5) Answering the averments of paragraph numbered Fifth of the bill of complaint these defendants say, upon information and belief, that the Zentral Einkaufsgesell-
1014 schaft, m. b. H., is a Society organized under the laws of Germany providing for the organization of such Societies. Upon information and belief these defendants say that while such organizations are not known as corporations in Germany they possess many attributes similar to the attributes possessed by corporations in the United States.

Further answering said paragraph these defendants, upon information and belief, admit that the said Society was organized in or about the month of January, 1915, with its principal place of business at Berlin, Germany.

Further answering said paragraph these defendants say that they are without knowledge with respect to the other separate and several allegations thereof, and therefore demand strict proof thereof.

(6) The averments of paragraph numbered Sixth of the bill of complaint are statements of law which these defendants are not required to answer.

(7-8-9-10-11) They are without knowledge as to the averments of paragraphs numbered Seventh, Eighth, Ninth, Tenth and Eleventh of the bill of complaint, and therefore demand strict proof thereof.

(12) Answering the averments of paragraph numbered Twelfth of the bill of complaint these defendants say that the Alien Property Custodian, after investigation determined, that the Zentral Einkaufsgesellschaft, m. b. 1016
H., was an enemy, and that certain money and other property was held for, by, on account of, and for the benefit of the said enemy. Thereupon the Alien Property Custodian required the said money and other property to be conveyed, transferred, assigned, delivered and/or paid to him. The requirements of the Alien Property Custodian were fulfilled and he received a large amount of money and other property. The said money was paid into the Treasury of the United States pursuant to the provisions of Section 12 of the Trading with the Enemy Act, and there is now in the Treasury of the United States a sum considerably in excess of the 1017
amount claimed by the plaintiffs in this suit.

Further answering said paragraph these defendants say that they are without knowledge with respect to the other separate and several allegations thereof, and therefore demand strict proof thereof.

(13) Answering the averments of paragraph numbered Thirteenth of the bill of complaint these defendants admit that the plaintiffs duly filed with the Alien Property Custodian a notice of their claim under oath and in the form and containing the particulars required by the Custodian, and that no application has been made for the allowance of the said claim and said claim has not been allowed.

1018 *Exhibit C of Petition for leave to Intervene*

FOR THEIR FURTHER SEPARATE AND SEVERAL DEFENSES THESE DEFENDANTS SEPARATELY AND SEVERALLY SAY:

(14) On or about the 19th day of June, 1924, there was entered in the Supreme Court of the District of Columbia a final decree in a suit instituted by the Securities Corporation General against Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, in equity 41153, wherein the defendant, the Treasurer of the United States, was re-
1019 quired to pay to the plaintiff the sum of $250,000, with interest at the rate of six per centum per annum from July 14, 1919, until paid. Thereafter the Treasurer of the United States in satisfaction of said decree paid to the plaintiff in the said suit, the Securities Corporation General, certain sums of money but has not completely satisfied the said decree because it is insisted by the defendant, the Treasurer of the United States, that he is not in possession of any funds belonging to the Imperial German Government out of whose funds the amount of said judgment was directed to be paid.

(15) On or about the 21st day of December, 1927, the said Securities Corporation General filed in the said suit
1020 in the Supreme Court of the District of Columbia, its second supplemental bill of complaint, wherein it alleged that the money held by the Treasurer of the United States as the property of the Zentral Einkaufsgesellschaft, m. b. H., had, by reason of certain facts set forth in the said second supplemental bill of complaint, become the money and other property of the Imperial German Government, and was subject to the payment of the amount of said decree in favor of the Securities Corporation General remaining unpaid. In said second supplemental bill of complaint the said Securities Corporation General prays that the Court direct the Treasurer of the United States and the Alien Property Custodian to transfer to a trust known as Trust 555 to the credit of the Imperial German Government, the money and other property held by the Alien Property Custodian and the Treas-

urer of the United States to the credit of the Zentral Einkaufsgesellschaft, m. b. H. A copy of said second supplemental bill of complaint is attached hereto as Exhibit A, incorporated herein, and made a part hereof, for the purpose of advising the Court as to the claim of the plaintiffs therein. By pleading the facts concerning the suit in the Supreme Court of the District of Columbia, these defendants do not admit any of the facts alleged therein nor concede that the plaintiff is entitled to the relief prayed for.

(16) Upon information and belief these defendants 1022
say that in the event, Securities Corporation General, plaintiff in the said suit now pending in the Supreme Court of the District of Columbia, secures the relief for which it prays in its second supplemental bill of complaint, all of said money now held by the Alien Property Custodian in the name of the Zentral Einkaufsgellschaft, m. b. H., will become subject to numerous decrees which have been entered in the Supreme Court of the District of Columbia and in the District Court of the United States for the Eastern District of Missouri, which in the aggregate provided for the payment by the defendant, the Treasurer of the United States of money in an amount in excess of the money now held by these defend- 1023
ants in the name of Zentral Einkaufsgesellschaft, m. b. H., and which is the same money out of which the plaintiffs in this case are seeking to recover.

Wherefore having fully answered the bill of complaint, these defendants pray that they may be dismissed with their costs in this behalf expended, and for such other and further relief to which in the premises they may be entitled.

CHARLES H. TUTTLE,
United States Attorney,
Solicitor for Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States.

1024 **Exhibit A of Answer of Treasurer and Alien Property Custodian.**

(This exhibit to the answer of the Treasurer and Alien Property Custodian was not annexed to the petition for leave to intervene but was submitted on the hearing of the principal motion.)

IN THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

1025

SECURITIES CORPORATION GENERAL, Complainant, vs. HOWARD SUTHERLAND, as Alien Property Custodian, and FRANK WHITE as Treasurer of the United States, Defendants.	Equity No. 41153.

Second Supplemental Bill of Complaint.

To the Supreme Court of the District of Columbia:

1026 Securities Corporation General, a corporation, complainant herein, files herein this, its second supplemental bill of complaint, and respectfully shows as follows:

1. That it is a corporation organized under the laws of the State of Virginia and having its principal office in the City of Philadelphia, Pennsylvania, and that it brought the original suit and is now filing this second supplemental bill under the provisions of Section 9 of the Act of Congress, approved October 6, 1917, as amended, and commonly known as the Trading with the Enemy Act.

2. That the defendants, Howard Sutherland and Frank White, are citizens of the United States and are sued as Alien Property Custodian and Treasurer of the United States, respectively.

Exhibit A of Answer of Treasurer and Alien Property Custodian 1027

3. That the purpose of this supplemental bill is to obtain from this honorable Court orders and/or decrees directing and requiring the defendants to fully satisfy the final decree heretofore entered in this cause, out of property and/or money seized by the Alien Property Custodian and owing or belonging to, or held by, for, on account of or on behalf of, or for the benefit of the Imperial German Government or its successor Government, the Republic of Germany, and now held by the defendants.

4. That complainant is a person, not an enemy or ally 1028
of an enemy, within the meaning of Section 9 of the Trading with the Enemy Act, approved October 6, 1917, as amended.

5. That on October 6, 1917, the date of the approval of said Trading with the Enemy Act, the Imperial German Government was an enemy within the meaning of said Act and continued to be an enemy until it ceased to exist as a Government.

6. That in the proceedings heretofore had herein on June 19, 1924, a final decree was entered which, among other things, required the defendant, Frank White, as Treasurer of the United States, upon presentation and 1029
surrender of certain Treasury notes of the Imperial German Government, as set forth therein, to forthwith pay and deliver complainant the sum of Two Hundred and Fifty Thousand Dollars ($250,000) with interest at the rate of six per centum (6%) per annum from July 14, 1919, until paid.

7. That on January 14, 1926, and pursuant to the decree above referred to, complainant received from the Treasurer of the United States in partial satisfaction of said decree the face amount of said notes amounting to Two Hundred and Fifty Thousand Dollars ($250,000) and the sum of Twenty-Four Thousand One Hundred and Seventy-Six Dollars and Seven Cents ($24,176.07) on account of interest at the rate of six per cent (6%) and

1030 *Exhibit A of Answer of Treasurer and Alien Property Custodian*

on the 29th day of March, 1926, the further sum of Four Thousand Two Hundred Seventy-eight Dollars and Seventy-nine Cents ($4,278.79) on account of interest at the rate of six per cent (6%) due on said notes from July 14, 1919, to January 14, 1926, leaving due and unpaid on account of interest accrued during said period the sum of Sixty-nine Thousand and Forty-five Dollars and Fourteen Cents ($69,045.14) which said sum has not been paid, nor any part thereof, and
1031 there is now due and owing, and the Treasurer of the United States and/or The Alien Property Custodian should pay to the complainant said sum of Sixty-nine Thousand Forty-five Dollars and Fourteen Cents ($69,045.14) as provided in said final decree.

8. That the Treasurer of the United States claims to have exhausted the funds in his hands standing to the credit of the Imperial German Government, and the Alien Property Custodian claims that he holds no other property and/or money which is owing or belonging to, or held for, by, on account of or on behalf of, or for the benefit of the Imperial German Government or for its successor Government, the Republic of Germany, and both
1032 of said defendants have declined and refuse to pay the balance due complainant as provided in said final decree.

9. That notwithstanding said refusal, complainant alleges and avers on information and belief that said defendants now hold property and/or money in excess of Seven Hundred Thousand Dollars ($700,000), which is owed or belongs to, or is held for, by, on account of or on behalf of, or for the benefit of the Imperial German Government or its successor Government, the Republic of Germany, which said property and/or money ought, in law and in equity, to be credited to said Imperial German Government upon the books of said Treasurer and the Custodian and applied to the further satisfaction of Complainant's judgment.

Exhibit A of Answer of Treasurer and Alien Property Custodian 1033

10. That said property and/or money in excess of Seven Hundred Thousand Dollars ($700,000) is held to the credit of trust No. 592 in the name of "Zentral Einkaufs Gesellschaft."

11. That the Zentral Einkaufs Gesellschaft was a corporation organized in 1914 under the laws of Germany.

12. That the original capital of said corporation was principally subscribed for by the Imperial German Government, the German States and Free Cities of Hamburg, Bremen and Lubeck, and a small percentage thereof by 1034 private individuals, firms and corporations, all of whom were German Nationals.

13. That said corporation was organized under Governmental direction; that it was a Governmental agency and that the representative of said corporation in the United States was H. F. Albert, Commercial Attache of the Imperial German Government; that said corporation during the period of the world war acted as a purchasing agent for the Imperial German Government.

14. That said corporation was organized during the war in 1914 for Governmental purposes and to centralize 1035 the purchase abroad of goods, particularly foodstuffs and raw materials, to be used in Germany during the world war; that the corporation occupied a special status and was in every sense a governmental agency, and was operated under a governmental supervision, and in many cases was excepted or exempted in war legislation from rules and regulations applying to and regulating ordinary business corporations; that with respect to some commodities, the corporation enjoyed a governmental monoply, as for instance, the importation of rice, sugar, meat, fish and eggs.

15. That the greater part of the business of said corporation in the United States was conducted through the office of H. F. Albert, which was designed as a Commercial Office of the German Embassy; that when sup-

plies and raw materials purchased by the corporation arrived in Germany, they were distributed under Governmental supervision and regulation; that said corporation transacted no business other than for the benefit of the Imperial German Government or its people in the supply of goods as heretofore stated; that it was not conducted for profit and was intended to be, and was, mainly a German Governmental agency and handled its business for the German Government and its people.

1037 16. That in addition to the corporation's original capitalization, purchases made through it were financed by the Imperial German Government, and, in some instances, by the German State Governments and funds furnished it with which to buy supplies and raw materials.

17. That the notes of the Imperial German Government referred to in complainant's original bill, and for the payment of which with interest judgment was secured, were payable in dollars and were known as Series No. 26; that a large percentage of the proceeds of said series of notes sold in the United States in 1916 to citizens thereof, were turned over by the German Embassy and
1038 placed to the credit of the Zentral Einkaufs Gesellschaft and used by it in the purchase of supplies and raw materials for the Imperial German Government; that by reason thereof, said corporation became indebted to the German Government to the extent of the amounts advanced by it.

18. That the German Government originally subscribed for and has continuously owned shares of said corporation of a par value of 29,950,000 marks, and the several German States originally subscribed for shares having a par value of 13,800,000 marks, all of which, except shares having a par value of 100,000 marks, were acquired by the German Government; that the present German Government now owns all of the outstanding capital shares of said corporation, the amount authorized and outstanding being 45,000,000 paper marks, ex-

cept shares of the par value of 100,000 paper marks owned by the Free State of Oldenburg and shares having a par value of 250,000 paper marks, held and owned by German private industrial concerns; that the percentage of said shares now held and owned by the German Government is 99.3% of the total shares issued and outstanding.

19. That said corporation, acting through its duly authorized officers, executed in writing and filed with the Alien Property Custodian its consent to the use of the 1040
property or money in said Trust No. 592 for the payment of complainant's judgment and judgments obtained by other American note-holders similarly situated and authorized the Alien Property Custodian to make such payment.

20. That the German Government, acting through the Reichminister der Finanzen, who had full authority under the law of Germany, executed and filed with the Alien Property Custodian its consent to the use of any funds of the Zentral Einkaufs Gesellschaft in which it had any interest or which was due and owing to it by said corporation, in the payment of complainant's judgment 1041
and of judgments obtained by other American noteholders similarly situated.

21. That no claim has been filed with the Alien Property Custodian against said corporation; that there are no suits pending against the said corporation in the United States; that no judgments by American citizens or neutrals or by anyone else have been secured against it in the United States and that the corporation owes no debts in the United States.

22. That all of the debts of said corporation have been paid except the indebtedness due by it to the German Government and all claims settled except one which was then in litigation in Germany.

23. That up to October 31, 1926, said corporation was

1042 *Exhibit A of Answer of Treasurer and Alien Property Custodian*

in the hands of a liquidator, duly appointed and qualified under German law and the business and affairs of said corporation were until then in liquidation in accordance with German law and said corporation was not actively engaged in business.

24. That since October 31, 1926, and, pursuant to the provisions and requirements of the German law of July 15, 1921, the German Government has, by declaration, and pursuant to due forms of German law, declared
1043 that, as of October 31, 1926, the Zentral Einkaufs Gesellschaft was taken over by the Reich, or German Government, together with its assets and liabilities; and said declaration, as required by German law, was published in the German Official Law Record, known as the Reichsanseiger, of November 1, 1926, and, thereafter, proper entries, as required by German law, were made upon the Commercial Corporation Register of the City of Berlin, noting the fact that the Zentral Einkaufs Gesellschaft as a corporation, was dissolved and extinguished according to paragraphs 7 and 10 of the Law of July 15, 1921, German Law Record, page 942.

1044 25. That the effect of the action of the German Government, as set forth in the preceding paragraph, was to completely dissolve and extinguish the said Zentral Einkaufs Gesellschaft, and destroy and put an end to its corporate entity, and to vest the legal title to all of the assets and liabilities of said Zentral Einkaufs Gesellschaft in the German Government.

26. That notwithstanding the dissolution and extinguishment of the said Zentral Einkaufs Gesellschaft and the taking over of its assets and liabilities by the German Government, as set forth herein, the defendants have declined and refused and still decline and refuse, to use or permit to be used, for the further satisfaction of complainant's judgment and similar judgments of other American citizens, the property and/or money held to

 1045

the credit of Trust No. 592 in the name of "Zentral Einkaufs Gesellschaft" and said defendants continue to insist that they have exhausted the funds in their hands belonging to the Imperial German Government and claim that they hold no other property and/or money which, under Section 9 of the Trading with the Enemy Act as amended, can be applied to the further satisfaction of complainant's said decree of June 19, 1924.

Wherefore, your complainant prays:

1. That said Howard Sutherland, as Alien Property Custodian, and said Frank White, as Treasurer of the United States, be made parties defendant to this supplemental bill and required to answer the same, but not under oath, answer under oath being hereby expressly waived. 1046

2. That the defendants, as Treasurer of the United States and as Alien Property Custodian, be ordered, directed and required by mandatory injunction or otherwise, to transfer to Trust No. 555 and to the credit of the Imperial German Government, the property and/or money now held by the Custodian and Treasurer in Trust No. 592 to the credit of the Zentral Einkaufs Gesellschaft and to use said property and/or money for the satisfaction of the decree heretofore entered in favor of the complainant. 1047

3. That this Court order and decree that complainant is entitled to be paid the balance due on its decree in this cause from the property and/or money held in Trust No. 592 in the name of Zentral Einkaufs Gesellschaft.

4. That said Court enter such further orders and decrees and grant such other writs and remedies as may be necessary or proper to enforce and carry into effect the final decree heretofore entered in this cause to the end that complainant may be paid in full the amount heretofore adjudged by this Court to be due it.

1048 *Exhibit A of Answer of Treasurer and Alien Property Custodian*

5. That due process may be issued and the complainant may be granted such other, further and general relief in the premises as the nature of its case may require, or to equity may seem meet and complainant will ever pray.

SECURITIES CORPORATION GENERAL,
By CARLIN, CARLIN & HALL,
Its Attorneys,
Munsey Building,
1049 Washington, D. C.

Of Counsel:
NORDYCE, HALLIDAY & WHITE,
McKENNEY & FLANNERY.

District of Columbia, ss:

I, M. Carter Hall, being first duly sworn on oath, depose and say that I have read the foregoing supplemental bill by me subscribed as attorney for the Securities Corporation General, all of the officers of which said corporation are absent from the District of Columbia and that I know the contents thereof; that
1050 the facts therein stated on my own personal knowledge are true; that those stated on information and belief, I believe to be true.

M. CARTER HALL.

Subscribed and sworn to before me
this 12th day of December, 1927.
My commission expires December 26, 1927.
Katherine E. Merkling,
Notary Public.
(Seal.)

Exhibit D of Petition for Leave to Intervene. 1051

Final Decree.

At a Term of the United States District Court for the Southern District of New York, held at the Federal Building, Borough of Manhattan, City of New York, on the 30th day of December, 1929.

Present: Hon. Francis G. Caffey,
United States District Judge.

1052

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against HOWARD SUTHERLAND as Alien Property Custodian, WALTER O. WOODS as Treasurer of the United States, and ZENTRAL-EINKAUF-GESELLSCHAFT, m. b. H., Defendants.	Final Decree. Equity No. E44-28.

1053

This cause came on to be heard at this term upon the bill of complaint, the answers of the defendants, the stipulations of the parties and after hearing the testimony presented by the parties, and arguments of counsel, and upon due considerations thereof, it is by the Court this the 30th day of December, 1929,

Adjudged, Ordered and Decreed as follows:

1. That Walter O. Woods, as Treasurer of the United States be substituted as a party defendant herein in place and stead of the defendant, Frank White, as Treasurer of the United States.

2. That the defendant, Zentral-Einkaufsgesellschaft, m. b. H., is indebted to the plaintiffs in the sum of $380,761.54, with interest at the rate of 6% per annum to the date of this decree on $84,472.08 thereof from

1054 *Exhibit D of Petition for Leave to Intervene*

April 17, 1915, amounting to $74,512.82; on $105,136.12 thereof from March 19, 1915, amounting to $93,245.22; on $83,938.02 thereof from May 11, 1915, amounting to $73,462.56; on $48,396.88 thereof from May 3, 1915, amounting to $42,565.05; on $58,818.44 thereof from May 13, 1915, amounting to $51,613.18, making a total of $716,160.37, no part of which has been paid.

3. That the defendants, Howard Sutherland, as Alien Property Custodian and/or Walter O. Woods, as Treasurer of the United States, pay, convey, transfer, assign
1055 and deliver unto the plaintiffs herein out of the money and/or other property seized by the Alien Property Custodian in the name of the Zentral-Einkaufsgesellschaft, m. b. H., and now held by said Alien Property Custodian and/or said Treasurer of the United States, the sum of $716,160.37, with interest at the rate of 6% thereon from the date of this decree to the date of payment to the plaintiffs.

FRANCIS G. CAFFEY,
United States District Judge.

Filed January 2, 1930.

1056

Exhibit E of Petition for Leave to Intervene. 1057

Letter From Executor to Sorenson and Nielsen of June 14, 1918.

2281

June 14, 1918

John S. Sorenson,
Thorlief S. B. Nielsen, Esqs.,
New York City.

1058

Dear Sirs:

This company, as Executor of the will of Hermann Sielcken, requests you, as surviving partners of the firm of Crossman & Sielcken, to continue such litigation as has been heretofore instituted, and to institute such litigation as may be necessary or advisable for the collection of the obligations due the firm of Crossman & Sielcken, in your names as surviving partners, and it is agreed that your action taken in response to this request shall in no way prejudice any claim on your part as to the nature or extent of your rights as to the division of profits or otherwise upon the termination of the partnership. 1059

Very truly yours,

COLUMBIA TRUST COMPANY, Executor
of the estate of Hermann Sielcken
By W
Vice-President.

gew.dw

Exhibit F of Petition for Leave to Intervene.

This is a duplicate copy of Exhibit H of the Affidavit of Vincent L. Banker, which Exhibit is printed above at pages 292 to 294.

1060 **Exhibit G of Petition for Leave to Intervene.**

ALIEN PROPERTY CUSTODIAN

SIXTEENTH AND P STREETS, NW

Washington, D. C.

New York, January 14, 1918.

Crossman & Sielcken.

Mr. G. E. Warren, V. P.,
1061 Columbia Trust Co.,
60 Broadway, N. Y. C.

Dear Sirs:

I acknowledge receipt of a certificate evidencing your appointment as temporary administrator of the Estate of Hermann Sielcken.

Under date of November 31, 1917, you were appointed my Agent for the purpose of supervising the liquidation of the interest of Hermann Sielcken in the firm of Crossman & Sielcken under license ET-344, issued by the War Trade Board.

In view of the death of Mr. Sielcken, and your ap-
1062 pointment as temporary administrator and nomination as executor of his will, you are hereby authorized as such temporary administrator, and executor when letters are issued to you, to take possession of all the assets of the late Hermann Sielcken as of October 8, 1917, the date of his death and to account for them thereafter in due course of administration. In liquidating the interest of the late Hermann Sielcken in the firm of Crossman & Sielcken you will, of course, pay the necessary expenses incident thereto and the debts owing by the firm, the estate being the sole owner thereof.

It will, however, be necessary for you to obtain a license from the War Trade Board authorizing you to take over and manage the estate of said Sielcken as such administrator and executor.

Exhibit G of Petition for Leave to Intervene 1063

A statement of the assets and liabilities of the firm of Crossman & Sielcken as of September 30, 1917, was prepared by Arthur Young & Co. under the direction of this Department which statement, for the purposes of liquidation, is satisfactory to this Department. This statement is to be continued down to October 8, 1917, the date of Mr. Sielcken's death, for the purpose of establishing the value of the estate taken over by you.

The settlement made with the surviving partners, whose interest terminated upon the dissolution of the firm, is approved. 1064

Yours very truly,

(Signed) J. A. BOWER, Mgr.
Genl. Business Dept.

1065

1066 **Affidavit of Selden Bacon, Verified June 16, 1938.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and
1067 ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

In proceedings to vacate final decree of December 30, 1929.

Equity No. 44-28.

State of New York,
County of New York, ss:

Selden Bacon, being duly sworn, deposes and says:

That he has for more than six years last past been
1068 one of counsel for the Irving Trust Company as Executor of Hermann Sielcken, deceased, in the course of which deponent has represented the said executor in numerous prolonged litigations, among others the action brought in the Supreme Court for New York County by the Chase National Bank as Ancillary Executor of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, the said Irving Trust Company as executor of said Sielcken, and others; also elaborate proceedings before the Surrogate on an application of the residuary legatee of the estate of said Sielcken to vacate certain decrees approving its accountings, and other proceedings, all of which have involved very extensive study of transactions of the estate and of the firm of Crossman & Sielcken and of the activities of the Alien Property Custodian in connection with the firm of Crossman & Sielcken and the interest of Clara Sielcken, widow of decedent, in his estate.

The matters presented are of extraordinary complexity. The Attorney General in support of his motion has presented about 240 pages of affidavits and exhibits and in many important respects the affidavit presented is quite inaccurate and gives an entirely erroneous view of the facts involved in the motion; that in order to clear up these errors it will probably be necessary to present almost equally extensive papers to correct in a conclusive manner the errors in the moving papers. The selection of the necessary documents, procuring copies thereof, and preparation of affidavits of 1070
persons personally familiar with the facts will involve a great deal of labor and time and, in deponent's opinion, at least twenty days will be needed to prepare such papers properly.

Deponent further says that he has been a member of the bar, first of Minnesota and later of New York, for over fifty years, and has had considerable familiarity with proceedings before the Alien Property Custodian; that he personally examined all the records he could find in the office of the Alien Property Custodian relating to this matter and has personally assisted in the examination of witnesses connected with the War Trade Board and its predecessor, and that in deponent's opin- 1071
ion the Irving Trust Company as such executor of Hermann Sielcken, deceased, has a complete answer and defense to the motion of the Attorney General to vacate the said decree of December 30, 1929.

Deponent further says that he is informed and believes that the motion to vacate the said decree of December 30, 1929, now stands marked to be brought on, on the 21st day of June, 1938.

SELDEN BACON.

Sworn to before me this
16th day of June, 1938.
M. Paul,
Notary Public, Kings Co.
Kings Co. Clk. No. 5, Reg. No. 108.
Certificate filed in
N. Y. Co. Clk. No. 42, Reg. No. 0-P-29.
Queens Co. Clk. No. 331, Reg. No. 1962.
Bronx Co. Clk. No. 8, Reg. No. 49-P-40.
Westchester Co. Suffolk Co. Nassau Co. 1-P-40.
Commission expires March 30, 1940.
(Seal.)

1072 **Order of June 28, 1938, Permitting Intervention of Irving Trust Company as Executor.**

At a Stated Term of the United States District Court for the Southern District of New York held in the U. S. Court house in the City, County and Southern District of New York on the 28th day of June, 1938.

Present: Hon. George Murray Hulbert,
District Judge.

1073 JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

Equity No. 44-28.

In proceedings to vacate final decree of December 30, 1929.

1074

Order permitting intervention of Irving Trust Company as Executor.

The above entitled matter came on to be heard upon an order to show cause why the Irving Trust Company as Executor of Hermann Sielcken, deceased, should not be permitted to intervene in this proceeding to vacate the decree of December 30, 1929, mentioned in its petition and oppose and answer the proceeding of the Attorney General of the United States as successor to the Alien Property Custodian to vacate the said decree of December 30, 1929, and why the Attorney General of the United States as successor to the Alien Property Custodian should not be required to serve a copy of his notice of such motion to vacate the said decree and the papers thereto annexed on the solicitors appearing for the said Irving Trust Company as such executor of

Order of June 28, 1938, Permitting Intervention of Irving Trust Company as Executor 1075

Hermann Sielcken, deceased, within a time to be fixed by this Court and why the said Irving Trust Company as such executor should not have thirty days in which to answer such motion papers and why the hearing of such motion to vacate said decree and any action upon such motion should not be stayed until the said Irving Trust Company should have such opportunity to serve its answering papers on said motion, and then be brought on for hearing on not less than two days' notice of the time and place for such hearing; Selden Bacon, Esq., and 1076
Leonard B. Smith, Esq., appearing as solicitors for and in behalf of the Irving Trust Company as such executor of Hermann Sielcken, deceased, and Lamar Hardy, United States Attorney (by Francis J. McNamara, Special Assistant to the United States Attorney General, of counsel), appearing on behalf of the Attorney General of the United States,

Now, upon the said order to show cause of June 16, 1938, and the admission of service thereof thereon endorsed, and on the petition of the Irving Trust Company as executor of the last will and testament of Hermann Sielcken, deceased, verified the 16th day of June, 1938, and the exhibits thereto annexed and the 1077
affidavit of Selden Bacon verified the 16th day of June, 1938, all of which are annexed to said order to show cause, and upon the notice of motion by the Attorney General of the United States as successor to the Alien Property Custodian, dated the 18th day of May, 1938, to vacate the final decree of this court of December 30, 1929, entered in the suit brought in this Court by John S. Sorenson and Thorleif S. B. Nielsen as surviving liquidating partners of the firm of Crossman & Sielcken, Plaintiffs, against Howard Sutherland as Alien Property Custodian and others, Defendants, and the affidavit of Frank C. Sterck, attorney, Department of Justice, verified the 18th day of May, 1938, and exhibits annexed to said affidavit, and after hearing the parties, and due consideration having been had, and on motion of the Irving Trust Company as such executor of Hermann Sielcken, deceased, it is hereby

1078 *Order of June 28, 1938, Permitting Intervention of Irving Trust Company as Executor*

Ordered that said Irving Trust Company as Executor of Hermann Sielcken, deceased, is hereby permitted to intervene in this proceeding to vacate said decree without prejudice to its defending against such application by reason of its intervention instead of having been originally cited upon such motion, as prayed in its said petition, and to oppose and answer such proceedings to vacate such decree of December 30, 1929.

It is further,

1079 Ordered that the Attorney General of the United States as successor to the Alien Property Custodian or his attorneys are hereby required to serve a copy of his notice of such motion to vacate the said decree and of the papers annexed to such notice on the solicitors so appearing for said Irving Trust Company as such executor of Hermann Sielcken, deceased, within five days after notice of the entry of this order.

And it is further,

Ordered that the said Irving Trust Company as such executor shall have thirty days in which to answer such motion papers after the service thereof upon its said solicitors, and that the Attorney General have thirty

1080 days in which to reply thereto.

And it is further,

Ordered that the hearing of the said motion to vacate said decree shall then be brought on for hearing on not less than five days notice of the time and place of such hearing to be given by any of the parties to such application to vacate said decree.

HULBERT,
U. S. D. J.

Foregoing form of order approved.

LEONARD B. SMITH and
SELDEN BACON,
Attys. for Irving Trust Co.
as Executor.
Atty. for Atty. General,
LAMAR HARDY by
DAVID W. WAIRHOUSE.

ANSWERING AFFIDAVITS SUBMITTED BY IRVING TRUST COMPANY. 1081

Answering Affidavit of Brainard Avery.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs, 1082

against

HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

In proceedings to vacate final decree of December 30, 1929.

Equity No. 44-28.

State of New York, 1083
County of New York, ss:

Brainard Avery, being duly sworn, deposes and says:

That he is a member of the bar of the State of New York and has been since 1899, and that he has been a member of the bar of the Supreme Court of the United States since 1900.

Deponent further says that his first connection with the matters involved in this suit occurred in March, 1927, at which time Mr. Alexander Wendroth Sielcken talked with deponent about the situation which he understood existed. At or about that time Mr. Sielcken explained to me that he believed that there were papers in the private files of the late Mr. Hermann Sielcken in Baden-Baden which he believed would show that the German Government, directly or indirectly, was the real purchaser of the cargoes that were consigned to Levin and Beckmann & Jorgensen, which were seized by the British Government and involved in this suit, and wanted to know if

there was not some way in which recovery could be had therefor.

Mr. Alex. Sielcken also at about that time took up with me the matter of possible claim against the firm of Theodor Wille and Germany for their withholding a large amount of bonds and Marks from the Sielcken estate pursuant to restrictive German legislation.

Mr. Alex Sielcken at that time told me of the establishment in 1921 by decree of the California Courts of the record of naturalization of the late Hermann Sielcken in
1085 California, and of his death in 1917, and of his mother's subsequent marriage to Schwarz, a Latvian, about 1921, and her still later naturalization as an American citizen.

He also told me sometime in March, 1927, that the executor believed the American estate had been fully administered and had rendered a voluntary final account which he showed me, and made distribution in accordance therewith to Mrs. Sielcken.

I then suggested to Mr. Sielcken that it looked to me as if claims could be made out before the Mixed Claims Commission, but that I would like to look into the matter first; that I was going to Washington shortly and would look over things there and talk with him further.

1086 I was in Washington on March 31st, 1927, and there saw Mr. H. H. Martin, the counsel to the American Agent (Mr. Bonynge) before the Mixed Claims Commission—United States and Germany, and talked over with him then the general features of the claims in question.

A little later I learned from Mr. Martin that while the executor had instructed him in 1924 to withdraw the 1922 Memorials against Wille, the State Department had not given *formal* notice of the withdrawal to the German Government, and in strict technicality the claims had not been formally withdrawn.

About the 7th to the 10th day of May, 1927, I went with Mr. Alexander Sielcken to see Mr. Orrin R. Judd (who was then a vice president of the Irving Trust Company), and asked him, at Mr. Sielcken's suggestion, if the executor would be willing to have Mrs. Sielcken present and prosecute such claims (without going into any

detail about them), at her own expense and cost and in such manner and names as she saw fit, she employing and paying the attorneys and counsel in the matter.

Mr. Judd said that before giving any definite answer he would like to talk the matter over with Mr. George E. Warren, who was then a vice president of the Chase Bank, but who had formerly been a vice president of the Irving Trust Company in charge of this estate.

Two or three days later, Mr. Judd told me that such an arrangement would be satisfactory to the Executor, and my firm, Barnes, Avery & Whiting, was then retained 1088
by Mrs. Sielcken Schwarz for the purpose of conducting these matters, by an arrangement, the terms of which are set forth in Exhibit A hereto annexed.

We promptly retained Messrs. Charles D. Hamel and Richard S. Doyle, of the Washington, District of Columbia, bar, to assist us in the presentation of these claims.

In the summer of 1927 I learned that a large sum, amounting to nearly $900,000, had been seized by the Alien Property Custodian and had been held under that seizure as the property of Unknown Enemy No. 1; and that in 1927 the Alien Property Custodian had recently discovered that Unknown Enemy No. 1 was the Zentral 1089
Einkaufsgesellschaft (hereinafter referred to as Z. E. G.), the successor to Reichseinkauf.

It seemed to us all that besides filing the proposed Memorial against Germany and the Z. E. G. it would be wise to commence at the same time a suit in the Federal Courts to recover the price of the seized cargoes from the Z. E. G. and have it paid out of this fund. We believed that the two proceedings, one before the Mixed Claims Commission and the other a suit in the Federal Court could properly proceed side by side, both because of the essential differences between the two tribunals and also because of the differences in parties and in the relief sought in the two proceedings.

In May, 1927, I sent my junior partner, Mr. George O. Castell, to Germany to locate all possible documents and information relating to the claims we had so undertaken

to present. Mr. Castell found in the files of the late Hermann Sielcken at Baden-Baden and Hamburg the key documents on which were based the claim that the Reichseinkauf (of which Z. E. G. was the successor) was the real purchaser of the cargoes involved in this suit, and that Z. E. G. had assumed the liabilities of the Reichseinkauf. Mr. Castell shortly thereafter reported from Hamburg to me in New York that he had found these papers in Baden-Baden but that on going to Hamburg he had also found papers showing that the German executors of
1091 Sielcken had attempted to have an arbitration with Z. E. G. of the claims for the price of the cargoes; that he had in Hamburg obtained access to the files of the late Dr. Kaemmerer, who had acted for the German executors in that matter, and from those files it appeared that, although the arbitration was never completed, a settlement had been agreed upon between Z. E. G. and the German executors of Hermann Sielcken, deceased, of the matters involved in the incomplete arbitration, by which the four German executors of Hermann Sielcken (while disclosing that they could not speak for or bind the firm of Crossman & Sielcken), had signed a paper undertaking that the estate of Herman Sielcken, of
1092 which they were the German Executors, would indemnify and hold Z. E. G. harmless if the firm of Crossman & Sielcken ever made any recovery from Z. E. G. on the firm's claim against Z. E. G. for the cargoes, which was the basis of this suit.

We were, of course, disturbed at the news of the existence of any such indemnity agreement, inasmuch as Mrs. Sielcken was the residuary legatee not only of the American Estate of Mr. Sielcken, but also of all his estate in Germany, which, according to our information, was far more than sufficient to answer to any such claim for indemnity; and any claim on that indemnity agreement would naturally be asserted by Z. E. G. in Germany against the German Executors of Sielcken by suit there; and in response to that communication from Mr. Castell, I went abroad in August, 1927, to Hamburg, and there

I had interviews with Mr. Castell and with Mr. Carl Isenberg, who was not only a brother of Mrs. Sielcken but the active surviving German executor of the will of Hermann Sielcken in Germany, Messrs. Georgius and Gustav Diederichsen having both died before my arrival there, and Richard Isenberg, having for years stood aloof as far as possible from the administration of the Sielcken estate.

Mr. Carl Isenberg assured me that there had been a complete and final settlement made in Germany between the firm of Theodor Wille and the German executors and Mrs. Sielcken of all claims the firm of Theodor Wille had against Sielcken or his estate or the firm of Crossman & Sielcken. 1094

I also had confirmatory word of that earlier settlement made in Germany from Mr. Charles E. Hotchkiss of the firm of Davies, Auerbach & Cornell, who said he was familiar with that settlement.

I also met in Hamburg Dr. Baur, who had formerly been associated with Dr. Kaemmerer, who had acted as counsel for the German executors of Hermann Sielcken in the incomplete German arbitration proceeding, above mentioned, and Dr. Baur put Dr. Kaemmerer's files in the Arbitration proceedings and in connection with the so-called indemnity agreement at my service. 1095

It is true that the Memorial filed against Germany in 1922 on account of these cargoes claimed to recover only a one-half interest in the Cargoes, on the theory that Theodor Wille was responsible to Crossman & Sielcken for one-half of the loss.

It is my understanding that the counsel who presented that Memorial in 1922, namely Mr. Leonard B. Smith of New York and Mr. Kerr of Washington, at the time of filing those Memorials of 1922 were aware that the firm of Crossman & Sielcken had in 1917 claimed that they had the right to look to the firm of Theodor Wille for one-half of the loss on the seized cargoes and that their Memorial No. 2 of 1922 showed this claim. They were also aware at that time that Mrs. Sielcken claimed to have adjusted that matter herself with the firm of

1096 *Answering Affidavit of Brainard Avery*

Theodor Wille, but at that time there were two very large claims outstanding against the estate of Sielcken in this country, namely a claim of the Woolson Spice Company for something over One Million Dollars and a claim of Mrs. Blackwell amounting to about half of the estate, which were being litigated. The executor under the advice of its counsel took the position that Mrs. Sielcken had no authority to make a settlement of any claims of the firm, and that the supposed settlement with the firm of Theodor Wille made by her was not binding.

1097 There were three Memorials filed in 1922, of which only No. 2 referred to this matter.

Prior to the filing of the Memorials, Mrs. Sielcken wrote a letter to the Columbia Trust Company, as Executor of Sielcken, under date of December 11, 1922, reading as follows:

"Joseph S. Auerbach
Edward Cornell
Charles E. Hotchkiss
Charles H. Tuttle
Nicholas F. Lenssen
Warner B. Matteson
Harold C. McCollom
1098 Martin A. Schenck

Cable Address
'Overdare'

DAVIES, AUERBACH & CORNELL
Mutual Life Building,
34 Nassau Street

New York December 11, 1922

Estate of Hermann Sielcken, deceased.

Dear Sirs:

Concerning the proposal made at the conference in your office held December 8th, that you, as the executor of Mr. Sielcken's will, should file a claim with the Mixed Commission (constituted under the recent treaty between the United States of America and Germany) to recover an item of approximately $94,000 and interest, appearing upon the dollar account on the books of Crossman & Sielcken as owing from the firm of Theodor Wille, Hamburg, I herewith advise you that as the residuary legatee under said will I have no desire that this item should

be enforced as an obligation against said Theodor Wille. If, however, you deem it necessary, for your protection as such executor, to file such claim in order that no claims of creditors against the estate of Mr. Sielcken may be prejudiced, I desire that when the estate is in such condition that you are charged with no duty to collect said item other than for my personal advantage as residuary legatee, you shall withdraw said claim and prosecute it no further.

I remain,

Very truly yours, 1100

CLARA SIELCKEN SCHWARZ

Columbia Trust Company, as
Executor of the Last Will and
Testament of Hermann Sielcken, dec'd,
George E. Warren, Esq., Vice Pres.,
60 Broadway,
New York City."

The Memorials were then filed.

In 1923 the Woolson Spice and Blackwell claims were finally disposed of for much less than had been reserved to meet them and Mrs. Sielcken Schwarz was thereafter 1101 the only person having a beneficial interest in the estate.

About that time, too, these attorneys learned that that settlement had not been made by Mrs. Sielcken Schwarz alone with the firm of Theodor Wille, but that the German Executors of Sielcken had joined in making the same and that they were claiming that any sums due from persons in Germany were estate of Sielcken that they as German executors were entitled to collect in Germany.

Mr. Leonard B. Smith, in 1927, informed me that in view of Mrs. Sielcken's expressed wishes, she being the only person remaining interested in the estate, and the extreme difficulty of overturning that settlement in conflict with her wishes, and no interest of any third party being involved, the Executor notified the Mixed Claims Commission that it withdrew each of the said Memorials,

the other two Memorials having been practically disposed of by adverse rulings of the Commission in other cases which rendered them untenable, and the executor in this manner acknowledged that settlement made by Mrs. Sielcken with the firm of Theodor Wille, and in early 1924 directed that all three of those Memorials be withdrawn and the item of this claim against Theodor Wille for a share of the loss on the cargoes was then charged off to Profit and Loss on the books of Crossman & Sielcken, with the approval and consent of Mrs. Sielcken Schwarz and of Messrs. Nielsen and Sorenson and the 1103 American Executor.

I was informed in 1927 and 1928 by Carl Isenberg and Mr. Hotchkiss, and by counsel for the firm of Theodor Wille, that by reason of this settlement made in Germany with that firm, it no longer, in 1927, had any interest whatsoever either in the seized cargoes or in any recovery that might be made for the seized cargoes, or of the price of the seized cargoes; nor did they or their representatives thereafter ever at any time assert to the plaintiffs or to the American Executor or to deponent or his firm any claim that they had any interest whatsoever in the recovery made in this suit.

1104 These assurances were later confirmed in April, 1928, by the submission to deponent in Berlin of a draft of the answer of Germany and Wille to the Memorial against Germany with Theodor Wille impleaded, which answer was subsequently filed on October 30, 1928, in that proceeding, in substantially the same form. This draft of answer was shown to deponent in Germany about April, 1928, by Dr. von Lewinski (the German Agent before the Mixed Claims Commission), and by counsel then representing the firm of Theodor Wille.

At one of the Wille conferences in April, 1928, the counsel for Theodor Wille in answer to my direct question assured me that Wille had no claim against Crossman & Sielcken and that every such claim had been settled.

Deponent, while in Hamburg in 1927, saw in Dr. Kaemmerer's files copies of the said arbitration papers and

alleged indemnity agreement, which were later, to wit, on October 30th, 1928, filed with the answer on behalf of Zentral Einkaufs Gesellschaft to the Memorial against it before the Mixed Claims Commission, such papers being contained in the Exhibits A to L of that answer, in German, with translations of each paper into English as Exhibits A 1 to L 1 thereof. Copies of such Exhibits including the translations are hereto annexed, marked Exhibit B and hereby made part of this affidavit.

Deponent at once, with Mr. Wirth, questioned the validity and binding force of the said arbitration pro- 1106
ceedings and of the so-called indemnity agreement, under our law. Dr. von Lewinski, however, asserted that it was a German contract made in Germany between Germans, to be performed in Germany, and that it would be construed under German law, and doubtless in the German Courts; and that in his opinion it was a valid and binding contract under German law, and binding on the Sielcken estate in Germany. That our view was correct also under German law was supported later by the opinion of Dr. Neuman, a very prominent German lawyer, who had made a specialty of Commercial law, which was filed with the American Agent before the Mixed Claims Commission in November, 1928. 1107

In 1927, prior to bringing this suit in this Court, both Mrs. Sielcken and her son Alexander Wendroth Sielcken had informed me that Hermann Sielcken had maintained his domicile in New York from long prior to 1913 up until his death; that his last illness had been quite prolonged, extending for many months prior to his death on October 8, 1917; that he had maintained a summer home at Baden-Baden, in Germany, and was there when his illness became acute in the spring or early summer of 1917; that he was confined to his bed for several months before his death and entirely unable to be moved; that he was registered by the German authorities as an American citizen and as an enemy; that he actually was an American citizen; that Mrs. Sielcken-Schwarz, the residuary legatee, had come to this country in October, 1919, by permission of the United States; that she had

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taken proceedings in the California Courts to re-establish the record of Sielcken's naturalization in California as an American citizen and had succeeded in re-establishing that record; that the Alien Property Custodian and the Attorney General had thereupon, in 1921, released her interest in the estate of Hermann Sielcken, which the Alien Property Custodian had seized in October, 1918; that she had afterwards married Mr. Schwarz, who was a citizen of Latvia, and that after her marriage to him she, Mrs. Sielcken-Schwarz, had been naturalized as an
1109 American citizen here in New York in the year 1922 and was herself residing in New York, where she had bought a home and had voted. And deponent and his associates so believed.

Deponent also was informed by Mr. Hotchkiss from the accountings of the executor which were of record in the Surrogate's Court in New York that all debts of the decedent Sielcken and all legacies to other persons than said Clara Sielcken-Schwarz under the will of Hermann Sielcken had either been paid or had lapsed, and she was then the only person having an interest in the estate as sole residuary legatee thereof, and deponent and his associates believed all these statements and relied thereon
1110 in filing the bill herein.

At the time of filing the bill in this cause, the Circuit Court of Appeals in this District had recently filed its decision in the case of Stadtmuller vs. Miller, 11 Fed. (2d) 732.

We were informed by Mrs. Sielcken and her son that Mr. Sielcken had been a very sick man on April 6, 1917, and from as early as the spring of 1916 had been continually confined to his bed and so ill after March, 1917, that it was impossible to move him out of Germany at any time prior to his death on October 8, 1917; that throughout the first week in October, 1917, he was very low and obviously the end was near; and that he died on October 8th, 1917.

They also informed us that Mr. Sielcken was an American citizen and had always maintained his home in

New York and regarded his residence in Baden-Baden as merely temporary, and they, I think, used the expression that it was his "summer residence."

They also told us that he had retained his apartment by the year at the Waldorf Astoria from as early as 1910 until his death, and told us of the proceeding in California to which the Alien Property Custodian became a party, by which the record of his, said Sielcken's, naturalization as an American citizen had been re-established, and that upon that judgment of the California Court reinstating the record of Mr. Sielcken's naturalization being confirmed on appeal the Alien Property Custodian had released the interest of Mrs. Sielcken under the will of Hermann Sielcken from his prior seizure thereof in October, 1918. 1112

We believed all the foregoing statements made us to be true and relied on them in instituting this suit and in filing the Memorials of 1927.

Under the decision in the Stadtmuller case above cited and other then recent cases, my partners and I were of opinion that, despite his being in Germany from April 6, 1917, until his death, Mr. Sielcken had not been an enemy, and we so contended.

We had not heard, and knew nothing of the alleged proceeding instituted in Mr. Sielcken's name in Baden for his renaturalization as a German, which was brought to our attention only very much later, and was first suggested to us by the answers filed on behalf of the Zentral Einkaufs Gesellschaft and Theodor Wille to the Memorials we had presented before the Mixed Claims Commission—United States and Germany, about November 9, 1928, which, however, made only indefinite reference thereto, and we actually learned definitely of that alleged application only in 1934 or 1935. 1113

The contentions of the Irving Trust Company made in 1931 and 1932 in the action in the Supreme Court of New York instituted by the Chase National Bank as Ancillary Executor of Thorleif S. B. Nielsen against John S. Sorenson, Mrs. Sielcken Schwarz (formerly Mrs. Sielcken) and the Irving Trust Company as executor of

Hermann Sielcken, referred to in the moving papers, were not brought to our attention in 1927 or until after May, 1930; and my associates and I were not familiar with the decision of the Court of Appeals of New York in the peculiar case of Smith v. Proskey, 177 N. Y. 526; and, as I testified in that Chase Bank case (in a portion of my testimony there, in 1932, which has been omitted from the extracts from that testimony presented by the moving papers), I had never heard of that case and the ruling there made came as a surprise to me when pre-
1115 sented in support of their arguments by counsel for the American Executor of Sielcken in that Chase Bank case.

The decision of the Supreme Court in that Chase Bank case on that point was not given until the summer of 1933, more than three years after the payment of the decree in this suit by the Alien Property Custodian and the Treasurer of the United States. Moreover, the decision and the judgment in that case did not go so far as to hold that actions and suits to recover assets belonging to the firm were not properly maintainable in the names of the surviving partners, but only that the surviving partners were not liquidating partners, and that consequently after the recovery of the moneys the
1116 right to possess and administer the same did not belong to the surviving partners, but to the Executor of Sielcken.

At the time of bringing this suit in 1927, my associates and I all believed that any suit or action to recover any assets belonging to the firm should properly be brought in the names of Sorenson and Nielsen as surviving partners.

Deponent and the lawyers immediately associated with him in charge of the case were by no means alone in the belief at that time that Sorenson and Neilsen as the sole surviving members of the firm were the proper parties to maintain a suit to recover a partnership claim. That view was shared by the firm of Chadbourne, Stanchfield & Levy, who took that position in the course of the trial of the Chase National Bank suit. The same opinion was also held by Messrs. Davies, Auerbach & Cornell, who

had previously, in 1918, brought an action to recover a large claim due the firm of Crossman & Sielcken, in the names of Sorenson and Nielsen as surviving partners of that firm. That suit involved a claim exceeding $100,000 and the same view was apparently shared by the attorneys who had defended that action, Messrs. Griggs, Baldwin & Baldwin of New York, including Mr. Martin Conboy, formerly United States District Attorney for the Southern District of New York, as they settled the case without raising any such question, the defendant paying approximately $100,000. It was also the opinion of Mr. Sorenson's counsel, Mr. Murray D. Welsh. 1118 It was apparently also the opinion of Mr. Thomas E. Rhodes, the Assistant Attorney General and counsel to the Alien Property Custodian and the United States Treasurer in the present suit, who raised no such objection.

We made no secret of the interest of the American Executor in any sum to be recovered by this suit, but on the contrary had declared fully in the Memorial against the Zentral Einkaufs Gesellschaft which was filed by us with the Mixed Claims Commission—United States and Germany, about a month before this suit was commenced, the nature of the interest of the American Executor of Sielcken. 1119

That Memorial was fully known to Z.E.G., which filed its answer thereto on October 30, 1928.

Mr. Rhodes, the Assistant Attorney General who was counsel for the United States Treasurer and the Alien Property Custodian in this suit, knew of that Memorial and had access, if he desired, to all the files before the Mixed Claims Commission in that proceeding, and I cannot believe that so careful a lawyer as he failed to read that Memorial and the answer thereto before stipulating in this suit (prior to the trial thereof), as he did, that any of the Exhibits filed with the Mixed Claims Commission in connection with the answer of Z.E.G. to the similar claim there made, might be introduced in evidence on the trial of this case without further proof thereof. My recollection, too, is that on several occasions

1120 I talked with him prior to 1930 concerning the Z.E.G. files before the Mixed Claims Commission.

Before the Mixed Claims Commission it was, we thought, necessary to bring in every person directly interested in the recovery as a claimant; but in this suit we believed it proper in law that the suit should be brought in the names of the surviving partners alone, without joining the American Executor as a plaintiff. And we believed the surviving partners were the only proper plaintiffs in this suit, and when I testified in the Chase Bank action that we brought the suit in that way 1121 "in order to make it stick," I meant that we brought it in their names because we believed that that was the only proper way to bring it; while if, on the other hand, any objection were raised by any of the defendants to the absence of the Irving Trust Company as Executor, it could readily be brought in as a co-plaintiff or defendant by amendment of the bill, without in any way endangering the jurisdiction of the Court over the claim and its right to grant us relief, since all debts of the Sielcken estate had been paid as far as known or asserted, and all legacies under the will except the residuary legacy to Mrs. Sielcken (now Mrs. Sielcken Schwarz) 1122 had either lapsed or been fully paid, and she had been recognized as an American citizen by the Alien Property Custodian in 1921 and had also previous to that time voted as such; and while she had later married Mr. Schwarz, who was a Latvian, she had, after that marriage, been naturalized as an American citizen in 1922 and there was, therefore, no enemy interest in the claim represented by the executor, known to us.

Before instituting the suit, we also discussed very fully the question of the proper district in which to bring the suit. At first we thought the proper district would be either the Eastern District of New York because Mr. Sorenson resided there, or the Northern District of New Jersey because Nielsen resided there; and we actually filed papers in a suit in the United States District Court for the Eastern District of New York and then when the

papers were only partially served withdrew them and cancelled that suit, because we came to the conclusion that the Southern District of New York was the proper district.

The section of the "Trading with the Enemy Act," under which this suit was brought, reads:

"Sec. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right, or title * * * institute a suit in equity in the district court of the United States for the district in which *such claimant* resides, or, if a corporation, where it has its principal place of business, to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant," etc., etc. 1124

The "Trading with the Enemy Act" repeatedly speaks of a partnership as having a residence (see Sec. 2 [a]; Sec. 2 [c]-[a]; Sec. 2 [c]-[c]) and provides that "the word 'person' as used herein, shall be deemed to mean an individual, partnership," &c.

Moreover, Mr. Barnes found a case under a similar act, the Tucker Act, where suit had been brought by the surviving members of a partnership in the district where the partnership had always resided and had had its principal place of business, although the surviving partners resided in other districts and the jurisdiction of the district court in that district had been sustained without discussion of the merits of that question, on the ground that no objection had been taken until after answer on the merits. I think the case he found was the decision in *Matter of Hvoslef*, 237 U. S. 1. It was then a comparatively recent decision and he patterned the allegations in our bill on the allegations in that case, and we filed the bill (after dismissing the bill in the Eastern District), in the Southern District. 1125

That there was no bad faith in doing so is obvious from the fact that the individual residences of Sorenson in Brooklyn and Nielsen in New Jersey were stated openly in the bill, as well as the fact that the partnership residence had always been in the Southern District. We even

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went further and (although there had been no denial of these allegations in the bill) put in that evidence orally, so that it was called directly to the attention of the Court. No one, either party, counsel or Court, raised any objection on the ground that the Southern District was not the proper district.

The actual claimant here was not Sorenson nor Nielsen individually but the firm, of which they were the surviving partners.

The provision as to the district in which suit may be brought, especially in view of the general jurisdiction
1127 conferred on the District Courts in all cases by Section 17 of the Trading With the Enemy Act, seems to be, like all other such provisions, a mere provision as to venue and not jurisdiction; and a mere modal objection which is waived if not taken before answering on the merits, and which cannot be raised after pleading to the merits. (Matter of Hvoslef, 237 U. S. 1.)

The moving party has not, in its present motion, pointed out in what the alleged lack of jurisdiction consists. It was our unanimous opinion at the time that the Southern District of New York was the proper district and also if any objection were to be raised on the ground that
1128 the suit should be brought in another district or court that objection would have to be raised before answering upon the merits or it would be waived.

Deponent again calls the Court's attention to the fact that there was no concealment of the residences of the plaintiffs; and that they were not only openly stated in the bill, but were equally openly stated in evidence before the Court, although the allegations of the bill have not been denied.

It is also true that the interest of Hermann Sielcken's executor was fully disclosed at the trial, the partnership articles being introduced in evidence and the Court's attention being called specifically to the provisions directing that the surviving partners should turn over the entire partnership property to the executor.

These matters were even more fully stated in the Z.E.G. Memorial with which the attorneys for all parties in the suit were familiar.

The facts were thus stated openly to the Court, on each of the possible questions involving its jurisdiction, and the Court determined the facts in favor of the plaintiffs.

Shortly after the service of the subpoena *ad respondendum* herein on the Z.E.G., Dr. von der Decken, one of the German counsel for the Agent to the Mixed Claims Commission, who later presented the answer of the Z.E.G. 1130
to the Memorial, made a suggestion that he did not see the real purpose of this suit, as if the suit were successful and recovery were effected the estate of Sielcken would be bound to reimburse the Z.E.G. for any amount for which Z.E.G. was held liable to Crossman & Sielcken. This suggestion was made by Dr. von der Decken to my associate, Mr. Richard S. Doyle of Washington, in the presence of Mr. Martin, Counsel for the American Agent, and reported to me by Mr. Doyle.

After some discussion, it was suggested that if Dr. von der Decken would obtain from Germany the papers relating to the incomplete arbitration proceeding and to the obligation he claimed had been assumed by the Ger- 1131
man Executors of the estate of Hermann Sielcken and permit the American Agency and the attorneys for Crossman & Sielcken to examine these papers, the attorneys for Crossman & Sielcken would delay any further steps pending the examination of these papers and would not meantime enter judgment by default. This suggestion did not have direct fruition, but Dr. von Lewinski, the German Agent, made a suggestion to Mr. Bonynge that some one go over to Germany and meet the German counsel for those interested in the two Memorials and the German Agent or his representative and discuss matters over there. Mr. Bonynge, the American Agent, told me of this, saying he could not go, and he suggested that I go, and I accordingly left for Germany about March 3, 1928, going to Berlin, where I retained as our

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local representatives Mr. Fred Wirth and Dr. Karl Hirschland of the Berlin bar.

Before leaving for Germany, deponent had explained either to Mr. Bonynge, the American Agent, or to Mr. Martin, his counsel, that in the opinion of deponent not only was the incomplete arbitration (supposed to have occurred at the height of the war between United States and Germany in 1918) a nullity (as it was afterwards held to be by this Court) but that the alleged indemnity agreement was of doubtful validity.

1133 Both Sorenson and Nielsen were emphatic in their protests that any arbitration or settlement in Germany was unquestionably void as to them and their interests, as they had been given no notice of any such proceeding and the German Executors of Hermann Sielcken had no right, title or power to represent them in any capacity, and that the arbitration was particularly improper because it was made in Germany at the height of the war between Germany and the United States.

The two Memorials which were filed on November 3, 1927, the one against Z.E.G., and the still larger one against the firm of Theodor Wille, were both prepared by Mr. Earle B. Barnes, Mr. Richard S. Doyle and my-

1134 self with the assistance of Judge Charles D. Hamel and Mr. H. H. Martin.

The Memorial against Germany impleaded with Theodor Wille arose out of a large amount of German bonds and Marks claimed by Crossman & Sielcken, which had been withheld by the firm of Theodor Wille under instructions from the German Treuhänder, under the special War Legislation of Germany, on the basis of depreciation of that property during the period that it was so withheld by orders of the German Government; and also on the basis of the possible question whether the firm of Theodor Wille had actually purchased with funds sent them the bonds that they claimed to have bought and to hold, or had "bucketed" the transaction.

The Memorial against Germany impleaded with Z.E.G. proceeded on the claim that Z.E.G. was responsible for

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the price of the seized cargoes, being substantially the same claim as was later presented in the present suit.

Before taking each step in the matter, deponent consulted with the American Agency and particularly with Mr. H. H. Martin, the attorney for the American Agent, Mr. Bonynge, and attempted in every way to follow their suggestions and advice.

Before filing the Memorials and starting this suit, we discussed the pros and cons of filing both a Memorial and this suit with regard to the Z.E.G. claim with Mr. H. H. Martin and he expressed the opinion to us that he

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thought the two could go on together side by side until recovery was had in one or the other, and that probably this suit under the "Trading with the Enemy Act" would give more prompt relief than the proceeding before the Mixed Claims Commission, especially as there seemed to be an ample fund available to meet any recovery.

In preparing the Memorials we joined not only Sorenson and Nielsen but also the Irving Trust Company as executor of Hermann Sielcken, deceased, because it was in our opinion essential in that proceeding that all interests directly involved should be represented in the proceeding.

We duly filed a claim in accordance with the provisions

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of the "Trading with the Enemy Act," and then prepared a bill in equity for the Eastern District of New York, which district we, at first, selected because of Sorenson's residence there.

Immediately after filing that bill the attorneys connected with the proceeding all came to the conclusion that while the Eastern District of New York had been selected because of Sorenson's residence there, the Eastern District of New York was not the proper district in which to file the suit, but that the Southern District of New York was the proper district because the residence of the partnership, which was the claimant, had always been in the Southern District of New York and the "Trading with the Enemy Act" twice referred to the residence of a partnership and provided that the claim might be sued upon in the district of the residence of the claimant.

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The claimant in this instance was the partnership in liquidation and not either Sorenson or Nielsen as an individual. Sorenson resided in the Eastern District of New York; Nielsen resided in the Northern District of New Jersey; Sielcken, as we were all informed and believed, had, from as early as 1905, been domiciled in the Southern District of New York and had there maintained his residence until his death, and his American Executor was the Columbia Trust Company (now Irving Trust Company) whose residence and principal place of business was at all times since 1910 in the Southern District
1139 of New York. In view of all these facts, we came to the conclusion that the Southern District of New York was the proper district in which to bring suit.

We also (that is, Mr. Barnes, Judge Hamel of Washington, Mr. Richard S. Doyle of Washington, his partner, and myself) all discussed the question of who should be the plaintiffs in the suit brought, and we all came to the conclusion that the only proper plaintiffs in the suit were John S. Sorenson and Thorleif S. B. Nielsen as surviving liquidating partners of Crossman & Sielcken, and we so advised them.

At that time none of us was familiar with the special
1140 rule established in New York by the decision in the case of Smith vs. Proskey, and we believed that the surviving partners were the proper persons to maintain the suit, but we also believed that if any objections were made that the executor of Sielcken should also be made a party, the executor could be brought in by amendment.

The bill herein was filed on December 21, 1927, and subpoena *ad respondendum* was served on the defendants Sutherland and Frank White on the 22nd of December, 1927. On the 19th of January, 1928, the affidavit and order for service on Z.E.G. by publication was filed. On the 23rd of January, 1928, notice of appearance of the United States District Attorney for Howard Sutherland and Frank White was filed herein together with the combined motion to dismiss and answer on the merits of the defendants Sutherland and White. On January 23, 1928, there was filed herein the affidavit of mailing of

the subpoena *ad respondendum* to the defendant Z.E.G.

The suggestion made to me by Mr. Bonynge with regard to my trip to Germany was that I should make every effort to obtain full data in relation to the incomplete arbitration and the alleged indemnity agreement, and any other information I could get hold of as to the German position. I had no suggestion or instructions from either Mr. Bonynge or his counsel, Mr. Martin, that I was to discuss any question of settlement of the litigation, nor had I discussed any possibility of any such suggestion coming up with any of my associate counsel 1142
in the case, Mr. Barnes, Judge Hamel or Mr. Doyle.

Before going to Berlin I spent a week in London going over the records there relating to the seizure of the cargoes in question in the Admiralty Court and in the office of Messrs. Burne and Berridge, who had been the proctors representing Crossman & Sielcken in the Admiralty Court, and there acquainted myself as far as possible with all information I could get there. Previous to sailing from New York I had also gotten together all available information from the office of Mr. Stewart in Boston, who had at one time been trying to assert a claim against the British Government, through diplomatic channels, for the value of the cargoes of the seized vessels. 1143

We had a number of conferences in Berlin with officials of the German foreign office, some of them relating to the Memorial against Wille at which counsel for the firm of Theodor Wille were present, but not the counsel for the Z.E.G., and others of these conferences relating to the Memorial aginst Z.E.G. and the present suit, at which the attorneys representing the Z.E.G. were present, but not the attorneys representing the firm of Theodor Wille, who made no suggestion of being interested in the Z.E.G. matter, and who disclaimed having any interest therein.

At all the conferences (with one possible exception) there were also present Dr. von Lewinski (the German Agent before the Mixed Claims Commission), who, in a general way acted as Chairman of the Conferences, a number of gentlemen from the Berlin Foreign Office and counsel for Dr. von Lewinski.

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Before I left New York for Berlin, the suggestion had been made by Dr. von Lewinski or from his office, that instead of having the papers suggested by Dr. von der Decken sent from Berlin to Washington, they should be shown me in Berlin where we could have the fullest opportunity of examining them. One of the main purposes of my trip was to secure an examination of those papers.

At one of the meetings over the Z.E.G. claims, there were produced and furnished me copies of all the Exhibits A to L later annexed to the Z.E.G. Memorial,
1145 which included the so-called Indemnity Agreement, as being the papers on which they relied as constituting the arbitration agreement.

They also showed me, but did not at that time deliver to me, a copy of a draft of the proposed answer of Germany to the Memorial against Germany and Z.E.G. which conformed substantially to the answer subsequently filed by Germany to the Z.E.G. Memorial. They, however, did not furnish me with a copy of it at that time, claiming that it was not yet in final form.

I was accompanied at each of these conferences by Mr. Fred Wirth and frequently by Dr. Hirschland.

At one of these Z.E.G. conferences, one of the German
1146 representatives suggested as to this Z.E.G. claim that they might withhold any answer to this suit (although they claimed to have a good defense) and that we would then be able to collect out of the fund held by the Treasurer of the United States and the Alien Property Custodian; and that we be allowed to do this and keep the money we collected, the indemnity agreement discharged and that both Memorials be completely withdrawn as a settlement of the entire matter.

This suggestion was entirely unexpected, and had not been solicited by us in any way. Upon its presentation Mr. Wirth stated that we would take the suggestion under advisement and would report at the next meeting of the conference, a date for reconvening being fixed for several days later.

Mr. Wirth and I then discussed this proposal in private, and he and I agreed that it was quite impossible to

accept or even to discuss any such suggestion, both because it was entirely outside of my instructions from Mr. Bonynge, and also because it seemed to each of us that this was attempting to deal with matters affecting the interests of the United States which we could not properly take under consideration without first communicating the matter to counsel representing the United States, both before the Mixed Claims Commission and in this suit.

Upon the reconvening of the meeting about a week later, Mr. Wirth made a formal statement to the German 1148
representatives that it was impossible for us to negotiate with regard to any such matter on any such basis, both because it was beyond our instructions, and because it would be necessary for us to submit the whole matter to the various counsel for the United States before considering it.

Thereupon Dr. von Lewinski had a conference with me, during a recess of the meeting, in which he suggested that as a practical matter we arrange for a fifty-fifty division throughout, as a settlement of all the claims, omitting only certain items in the Wille claim aggregating about $500,000, which he refused to discuss and which he claimed (and which we believed) had been included 1149
in the previous settlement between Mrs. Sielcken, the German Executors and the firm of Theodor Wille; that all defenses be spread upon the record; and that thereupon the German Agent would agree with the American Agent on compromise awards to us of fifty per cent of each of the claims presented by the Memorials (omitting the said items of about $500,000 from the Wille Memorial), and that this be a complete settlement. We were to continue to prosecute the suit, on its merits. If we won they were to receive half the amount recovered in settlement of the claim for indemnity; if we lost the suit we were to receive the fifty per cent award.

I immediately told Dr. von Lewinski that I would have to discuss that with Mr. Wirth, and thereupon Mr. Wirth and I talked it over together, and both of us again agreed that it was entirely impossible to make any

such arrangement or even to negotiate concerning any such proposals without first submitting the proposal in its entirety to the various counsel representing the United States in the several matters. This decision of ours was promptly communicated by us to Dr. von Lewinski.

Dr. von Lewinski asked me where Mrs. Sielcken Schwarz was at that time and I told him that she was in Holstein. He then wanted to know whether, if such a settlement met the approval of the attorneys for the United States, what would be my own attitude concerning it. I said that to me personally it seemed that it would be a "fair
1151 enough" settlement. He then asked me to communicate with Mrs. Sielcken Schwarz and discuss it thoroughly with her, and ascertain whether the suggestion would be agreeable to her if it also met with the approval of the American Agent, Mr. Bonynge; Dr. von Lewinski added that he would meet me in the fall at Washington.

Before sailing back to America, I went to see Mrs. Sielcken Schwarz and discussed the matter with her and she informed me that if such a settlement met the approval of Mr. Bonynge it would be satisfactory to her.

During my 1928 visit to Germany there were no further discussions of the proposals so made, or any negotiations
1152 for settlement with the German representatives in Germany, and I returned to the United States, arriving in New York about the end of May, 1928.

On my arrival in New York, I was met at the pier by my partner, Mr. Barnes, and we at once went to my hotel and there discussed at length what had occurred in Germany. Mr. Barnes agreed absolutely with our stand that we could not discuss any such settlement without first submitting the whole proposal to the counsel for the United States.

Mr. Barnes and I had quite a discussion at that time as to which of us should present the matter to Mr. Rhodes, counsel for the United States in this case. Mr. Barnes suggested that as he was to act as trial counsel in the case he ought to do it, and that I, having been present at the conferences in Berlin, ought to accompany

him. We agreed that we would go together to see Mr. Rhodes and that Mr. Barnes would present the matter while I would be there for reference in case any question came up that needed special information.

We went down to Washington (as I recall it, it was between June 23d and June 30th, 1928) and I then saw Mr. Martin and explained the situation briefly to him. It was not a formal conference as there was no one there representing either Z.E.G. or Theodor Wille or the German Agent. Mr. Martin expressed the view to me at that time that it would be unwise to attempt to make 1154
any settlement until the question of responsibility of Z.E.G. for the price of the cargoes had been tried out in this suit where that issue was squarely raised. After that had been settled, the question of possible settlement of the dispute over the indemnity agreement and over the claim against Wille he thought could be worked out.

After conferences with Mr. Martin, on the same day I went with Mr. Barnes and saw Mr. Rhodes by appointment. It was, as I remember, a very hot day in June. We saw Mr. Rhodes and stayed there discussing the whole situation with him for fully two hours.

Mr. Barnes spoke principally from a memorandum 1155
that he and I had prepared to make sure that nothing was omitted. We had with us, and showed to Mr. Rhodes, a copy of the indemnity agreement and the arbitration agreement of the German Executors and translations of these, and copies of some of the other papers that were later incorporated in the German answer, which copies I had brought from Germany.

Mr. Barnes' statement of the case to Mr. Rhodes included a thorough explanation of the probability of a recovery by a citizen of Germany, in Germany, and in German courts, under the indemnity agreement in spite of our contention that that document was invalid and not binding and also pointed out the adequacy of the individual estate of Sielcken in Germany to meet all requirements of the indemnity.

As I recall it, Mr. Barnes' principal presentation of the facts took fully an hour and after that there was a

general discussion among the three of us and either Mr. Barnes or I explained to Mr. Rhodes the position that Mr. Martin had indicated—that no compromise of the Memorials should be attempted until the question of the liability of Z.E.G. for the cargoes had been determined.

Mr. Rhodes finally stated that he would have to take the matter up with someone else and would let us know. Shortly afterwards he advised Mr. Barnes that the position of the attorney general was that the United States was a trustee of this fund that had been seized by the
1157 Alien Property Custodian and that it could not enter into compromises or concessions over it; that all necessary law points involved in the title to the fund must be presented to the court at a trial at which the Attorney General would take such position as he might be advised but that Mr. Rhodes would endeavor to agree with Mr. Barnes as to what were the necessary law points which ought so to be raised in court.

After this meeting with Mr. Rhodes, I communicated the foregoing to representatives of the German Agent that consideration of the proposals of settlement would have to await determination of this suit. My recollection
1158 is I communicated this directly to Mr. Martin and later Mr. Martin and myself gave this information to Dr. von der Decken, who was one of the counsel for the German Agent, Dr. von Lewinski.

At our long talk with Mr. Rhodes, Mr. Barnes, as arranged, presented the situation that had developed and the proposals made by Mr. Zimmerman and Dr. von Lewinski, and I mentioned to Mr. Rhodes, as I recall it, at that time, the position taken by Mr. Martin that the question of the responsibility of Z.E.G. for the goods while at sea ought first to be tried out in court and that it could be done in this suit. Mr. Rhodes expressed substantial agreement with this view of Mr. Martin's.

At that conference we explained thoroughly to Mr. Rhodes the matter of the indemnity agreement, and the claim that was made by counsel for Z.E.G. that if we did collect from Z.E.G. in this suit Z.E.G. could and

would immediately turn around and sue the German executors of Sielcken under their covenant to indemnify and hold Z.E.G. harmless from any such recovery by the firm.

I explained to him our view that the contract was invalid and that we were securing the opinion of eminent German counsel to that effect, but that inasmuch as any such suit on the indemnity agreement would be brought in Germany before the German Courts and Z.E.G. was really a branch of the government, we very much feared the outcome of any such suit. 1160

Mr. Barnes had agreed with Mr. Wirth and myself that under New York law the indemnity agreement was invalid, but with the German lawyers at odds on the subject we did not feel certain of the outcome of any such lawsuit in the German Courts, especially under the circumstances presented. Moreover (as I think we told him) Mr. Sielcken had left a large individual estate in Germany, which would be ample to meet any such recovery under the indemnity agreement.

I was taken ill about the 13th day of July, 1928, with appendicitis and was too ill to attend to any business until after Labor Day that year, but my recollection is 1161 that the above interview with Mr. Martin and the long conference with Mr. Rhodes, that I have spoken of, occurred in June, 1928, and that the conference with Mr. Martin, myself, Judge Hamel and Mr. Doyle on November 21, 1928, was a second conference, though it is not essential that this should have been so, because I could not see Dr. von Lewinski until he arrived in this country and he did not come until late in the fall of 1928.

I learn that Mr. Martin has the following memorandum of a meeting on November 21, 1928, between himself, Judge Hamel, Mr. Doyle and myself in particular relation to this Z.E.G. claim:

"After an extended conference on the law and facts in this claim, the conclusion was reached that Mr. Avery is to proceed with the suit filed on behalf of claimants under the Trading with the Enemy Act * * * the act

1162 *Answering Affidavit of Brainard Avery*

of prosecution of which suit was suspended last spring pending negotiations that were under way at that time looking to a settlement of this claim and also the claim under Docket No. 8304.

"However before taking further action with respect to this suit Mr. Avery is to write us a letter saying that in view of the breakdown in the negotiations last spring looking to the settlement of this claim he proposes to now proceed with the suit. On the receipt of this letter, a copy thereof will be submitted to the German Agent
1163 for his information.

"We further discussed to some extent the question that the point may be raised either in the Commission or in the court that claimant should be put to his election as to which forum he desires to have his rights finally and definitely passed on. It was decided to leave the final determination of this question to the future should the point be raised."

Deponent recalls that there was a conference at which these statements were made.

Not later than November 27, 1928, deponent caused notice to be given to the German Agent, Dr. von Lewin-
1164 ski, that the proposed settlement could not be considered at this time, and that we would proceed with this suit. Mr. Doyle so wrote the American Agent under date of November 26, 1928, and a copy of Mr. Doyle's letter was submitted to the German Agent on November 27, 1928.

Shortly prior to this conference in November, 1928, the German answers to the two Memorials had been filed with the Mixed Claims Commission. An effort was then made by us to secure an audit of the books of Theodor Wille relating to the investment in German bonds in 1916 by the firm of Price, Waterhouse, as representatives of the American Agent.

The Wille claim, as it stood, was based on two alternative theories, one that Theodor Wille had actually purchased the bonds, as claimed by that firm, but had withheld them from delivery, despite demand for them, under the special German Wartime legislation, from about the

time that the United States went into the war until the Treaty of Peace, during which period repeated demands for surrender of the bonds had been refused by Theodor Wille and the bonds had gradually depreciated until they were worth very little. On that theory, the claim of the Memorialists was for the amount of that depreciation with interest. The other theory was that Theodor Wille had not actually purchased the bonds, but had entered them up as purchased and had itself "bucketed" the transaction, on which a somewhat larger recovery, consisting of the amount of money entrusted to them and 1166
interest, was claimed.

The firm of Theodor Wille declined to submit its books to the examination of any American accountants.

Shortly after the decision that we would not proceed to a settlement until this present suit had been tried, Z.E.G. filed its answer in this suit, namely on the 6th day of September, 1929, the plaintiffs voluntarily releasing Z.E.G. from its prior default.

Z.E.G. then made a motion to dismiss the Memorial against it, on the ground that it was a mere duplication of this suit. This claim was advanced on substantially the theory of "another action pending." We maintained, 1167
with care, that such was not the case; that the two jurisdictions were independent, and, moreover, that the parties were different, and the relief sought differed; so that there was no reason for dismissing either case, although recovery in either might dispose of the other.

Our contentions found favor with the Commission, which denied that motion. And we then proceeded with the preparation of this case for trial.

At about this time I retained Mr. George W. Alger of New York as additional counsel for the preparation and trial of the case, so that if anything happened to Mr. Barnes (he has since died) by reason of which he could not conduct the trial, Mr. Alger would be able to take it up and go on with it.

The idea was expressed by all the attorneys in the suit, as I recall it, that this suit would in the main turn on

the one question, whether Z.E.G. was liable for the price, in view of the fact that the British seizure was made while the goods were still at sea.

The trial of this suit occurred on December 20 and 21, 1929, in New York before Judge Caffey. Early in the hearing, Judge Caffey expressed the view that the German Executors of Sielcken had no authority to settle or otherwise dispose of a partnership asset which had come into existence prior to our entering the war, out of the 1914 and 1915 transactions. This was said by
1169 Judge Caffey in connection with the claim asserted by Z.E.G., that the incomplete arbitration which had resulted in the indemnity agreement between the German Executors of Sielcken and Z.E.G. amounted to a bar of the right of the plaintiffs to maintain this suit.

That point having been disposed of, there remained only the question whether, under the original contract, Z.E.G. was liable as purchaser for the goods, although seized while on the high seas by the British Government. On this point Judge Caffey ruled with the plaintiffs.

It was obvious to all of us that the so-called indemnity agreement, if it could not be treated as a settlement made
1170 by the German Executors on behalf of the firm of Crossman & Sielcken, was an independent contract which could not affect the judgment in this case, but only give rise to an independent claim by Z.E.G. against the German Executors of Sielcken, after recovery and collection in this cause. The validity and effect of the indemnity agreement in that connection was therefore not directly presented or argued on the trial of this suit.

On November 14, 1929, shortly before the case was reached for trial, there was a meeting in New York between the attorneys and representatives of Z.E.G., namely, Dr. H. F. Albert, Mr. Arthur Garfield Hays and Mr. Hays' partner, Mr. William Abramson, on the one part, and Mr. Barnes, Mr. Alger and myself on the part of the plaintiffs, for the purpose of arranging a stipulation of evidentiary facts affecting the seized cargoes, for the purposes of the trial of this cause, in so far as the parties

could agree thereon. Before the trial was reached, we stipulated both with Mr. Hays and Mr. Rhodes, in writing, that any of the papers filed with the Z.E.G. answer to the Memorials as exhibits might be given in evidence in this case without further authentication.

On the day following this conference, I sent a full account of what had occurred thereat to Mr. Martin, in a letter to him of November 15, 1929, reading as follows:

"November 15, 1929.

1172

"Hon. H. H. Martin, Counsel
Mixed Claims Commission,
1511 K Street,
Washington, D. C.

Dear Mr. Martin:

Dr. H. F. Albert, attorney for ZEG, arrived in New York on S.S. Bremen Tuesday, November 12th. A meeting was scheduled with him and Mr. Hays for Wednesday, the 13th. Mr. Hays was called to a trial, so the meeting did not occur until yesterday, Thursday, the 14th.

"Yesterday we were in session at Mr. Hays' office from two until after four P. M. There were present 1173
Messrs. Albert, Hays and Abramson, representing ZEG, and Barnes, Alger and myself representing claimant.

"Considerable time was spent in discussing stipulations covering seizure of the cargoes by the British, etc.

"Then Mr. Hays again brought up the question of settlement. The move for settlement was in the first instance made by Mr. Hays. Mr. Abramson expressed his disappointment that we were unable to settle in Berlin; and again Mr. Hays opened the subject. I mention this to indicate that we are receptive rather than pushing.

"As you are aware, what we are discussing is a possible settlement of a claim which arises in event we succeed in the litigation now pending in the U. S. Courts in this city. On the face of the papers, if C. & S. in Liq. obtain a recovery against ZEG, a claim may exist on the indemnity agreement given by the Sielcken executors to ZEG in Germany in settlement of the arbitration proceedings.

"Dr. Albert was suffering from severe hoarseness and was unable to speak readily, although Mr. Hays is evidently the spokesman. It is clear to us that notwithstanding what they may have said to the effect that Germany's interest is to defend the ZEG fund with the APC, Messrs. Albert, Hays, *et al.*, are much more interested in arriving at a settlement pursuant to which we recover the cash from the APC and pay over the amount in settlement directly to ZEG, or through its counsel. In fact, I brought that idea conspicuously to the front by
1175 remarking that Mr. Hays wanted the pie on the table, in preference to dividing a supposititious pie.

"The tentative settlement figure suggested by Mr. Hays is not to be considered by us except in connection with settlement of the Wille claim pending before the German Mixed Claims Commission. We might agree to Mr. Hays' suggestion about settlement of the ZEG claim, provided a suitable compromise is arranged of the Wille claim pending before the Commission. That is, if the German Agent is liberal on the Kriegseinleihe and mark items, we might be able to meet the hopes of Mr. Hays.

"Dr. Albert stated that Mr. von Lewinski expected to
1176 be on the Bremen, but was detained. He said he expected Mr. von Lewinski to arrive on November 18th, or at latest during that week (next week). Thereupon the meeting adjourned, with the understanding that we will reconvene upon the arrival of Mr. von Lewinski, although it is not promised that Mr. von Lewinski will attend our meeting. Dr. Albert did state that Mr. von Lewinski stipulates that whatever we do shall meet with the approval of the American Agent, referring to you by name.

"The ZEG case can hardly be reached for trial next week. There are about 20 cases ahead on the calendar, and possibly the case may not be reached until early December. In fact, we think it will be a misfortune to push the ZEG case on for trial until the negotiation for settlement occurs under the supervision of the German Agent and the American Agent.

"Will it be possible for you to be in New York to attending a meeting? We have been loath to take the

matter up with Mr. Bonynge. He is, of course, here, but Mr. Alger says attending on Mrs. Bonynge's recovery from an operation at the hospital, and physically very much below par himself. If you think we should take it up with Mr. Bonynge, however, please let us know.

"It is more than evident that Dr. Albert and Mr. Hays are urging settlement, but it would appear that the whole matter must remain in abeyance until it receives Mr. von Lewinski's attention.

1178

Sincerely yours,

A/B BRAINARD AVERY."

The statements in this letter are as full and accurate a statement as I can now make of what occurred at that meeting, and are true.

I call particular attention to the statement to Mr. Martin of my view of the attitude of Messrs. Albert, Hays, *et al.*, as showing very clearly how frankly the whole situation was laid before Mr. Martin by us.

The letter of November 16, 1929, from Mr. Martin to myself, which is given in the moving affidavit of Mr. 1179
Sterck, verified May 18, 1938, on page 14 of that affidavit, is Mr. Martin's letter in answer to the foregoing letter that I had sent him.

I do not know whether Mr. Martin made any communication to Mr. Rhodes on the subject of my letter to Mr. Martin of November 15, 1929, nor do I at this time recall having said anything to Mr. Rhodes myself about it up to the time of the trial. At all events, no further communications or conferences were held looking to any compromise of any branch of the case until after the trial and entry of the decree herein.

The case was tried carefully on Mr. Hays' part. All the points that had been discussed between us were raised by him, and fully and carefully argued before the Court, and the decision was in our favor, with a direction to the parties to settle the form of decree.

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The decree itself was, as I recall it, drafted by Mr. Rhodes and approved by us, but a further question arose before the filing of the decree as to the rate of interest and the time from which interest would run. Briefs were submitted by the parties on that point and a second brief opinion on the point was given by the Court. The decree was signed on December 30, 1929, but filed in the Clerk's Office only on January 2, 1930.

In further relation to that trial, I may say:

During the summer of 1929, Mr. H. H. Martin had
1181 called on me at New York and had mentioned to me the fact that these two Crossman & Sielcken Memorials were two of the large matters pending before the Commission and that they were very anxious to get that work advanced and completed, and that it was impossible to do it until the present case was tried and determined in this Court.

In answer to that suggestion, and on the same day, I went, with Mr. Barnes, to see Judge Knox of this Court to see if some arrangement could not be made to bring this case up promptly for trial, so as to expedite the work of the Mixed Claims Commission, and told him
1182 that we were bringing this up at the request of the American Agency. Judge Knox said he would be very glad to accommodate the Commission as far as possible and suggested that we see if perhaps Judge Caffey could try the case.

Mr. Barnes then communicated with the office of the United States District Attorney to inquire if it would be agreeable to them to try the case on a date to be fixed by Judge Caffey, if it would also be agreeable to Mr. Hays, counsel for Z.E.G. An agreement was reached with the U. S. Attorney's Office in New York, with Mr. Rhodes, as Assistant Attorney-General in Washington, Mr. Hays, Judge Caffey and ourselves that the case would be tried on December 20, 1929, before Judge Caffey, and it came on before him on that day. Most of the uncontested facts in the case had been stipulated between the parties; Mr. John S. Sorenson was sworn as a witness on behalf

of the plaintiffs, and Dr. Arthur Burchard was sworn as a witness on behalf of the defendant Z.E.G.

Some thirty-four exhibits, including stipulations of fact, were introduced by the plaintiffs and five exhibits were introduced by the defendants, and there was also presented a deposition of Dr. Walter Frisch, which had been taken by the defendant Z.E.G., of which a large part was excluded on objection of the plaintiffs on the grounds of incompetency and irrelevancy and hearsay.

The trial was concluded on the 21st day of December, 1929, and the case was decided from the bench. 1184

The bill of complaint in this cause set up the fact that John S. Sorenson resided in the Eastern District of New York and Thorleif S. B. Nielsen in the Northern District of New Jersey, and that the residence of the partnership of Crossman & Sielcken, of which they were the sole surviving partners, had always been in the Southern District of New York. These facts were undisputed, and no objection was raised by any party on the ground that the Southern District of New York was not the proper district in which to maintain the suit.

Nevertheless, on the trial, the evidence of these facts was elicited orally directly from Mr. Sorenson, and 1185
neither the Court nor any party suggested that the Southern District of New York was not the proper district. All three of the defendants had answered generally on the merits without raising any such question.

The main issue on which the trial centered was the construction of the contract between the Reichseinkauf and Crossman & Sielcken as to whether the loss of the cargoes was one that should be borne by Crossman & Sielcken or by Z.E.G., as successor to the Reichseinkauf. This question was carefully argued on the unquestioned facts and decided in favor of the plaintiffs.

Shortly after the entry of the judgment in the suit arrangements were made for a meeting in Washington at the offices of the Mixed Claims Commission of the attorneys for all the parties concerned in both Memorials and in the present suit, together with the German and American Agents and their counsel.

That meeting occurred on January 9, 1930, and the question of settlement was then definitely taken up. There were present at that conference the gentlemen named in the memorandum of that conference prepared by Mr. Martin, which appears on pages 15, 16, 17 and 18 of the affidavit of Mr. Sterck in the moving papers.

That memorandum is quite full and complete as to all features of the conference except two, and except for those two features deponent cannot at this time give any more accurate or definite statement of what occurred
1187 at that conference than is contained in those minutes of Mr. Martin's, which minutes deponent says are correct and complete to the best of his recollection, except for the two features about to be specified.

At that meeting the terms of settlement of the indemnity agreement, the amount to be paid, and how it was to be paid were all gone into in detail. Mr. Martin, however, took the position, indicated in his minutes, that neither the American Agency nor the Mixed Claims Commission had any interest in any compromise reached of the Z.E.G. claim for indemnity from the German Executors against them; that that was a claim which was
1188 made by a German against Germans under a contract made in Germany during the war and in no way came within the jurisdiction of the Commission or the American Agency, and that it was an independent outside claim wholly beyond the jurisdiction of the Commission.

Mr. Martin sent deponent a copy of these minutes on January 14, 1930. Deponent on January 16, 1930, in acknowledging the receipt of a copy of that memorandum, added:

"Your memo appears complete except that it does not include the tentative negotiations for settling the indemnity given by Sielcken's German executors to Z. E. G.

"Probably this was intentionally omitted by you as the Z.E.G. indemnity is, I suppose, strictly a matter to be considered and disposed of outside the purlieus of the Commission."

And on the 20th of January, 1930, Mr. Martin wrote deponent as follows:

"Dear Mr. Avery:

Receipt is acknowledged of your letter of the 16th instant, acknowledging my letter of the 14th, enclosing an informal memorandum covering the conference at Washington on the 9th instant in relation to the Crossman-Sielcken claims, Docket Nos. 8304 and 8305.

I purposely did not go into the proposed settlement between the Sielcken Estate and the ZEG of the so-called 1190
indemnity agreement other than passing reference thereto as found at pages 3 and 5 of my memorandum, for the reason that this is a matter that does not appear to particularly concern either the American or German Agencies.

Very truly yours,

H. H. MARTIN,
Counsel."

HHM:CMR

The other matter was called to Mr. Martin's attention by my associate, Mr. Doyle, and on January 16, 1930, Mr. Martin wrote to Mr. Doyle in regard to that memo- 1191
randum of the meeting of January 9, as follows:

"I recall that the German Agent said something about the impossibility on his part to secure a release from the firm of Theodor Wille of possible claims this firm may have. The point I wanted to make in my memorandum is that in so far as the two Agencies are concerned if the compromise agreement goes through, it will cover a complete settlement of those two claims in so far as they may be settled in the Commission."

Mr. Doyle advised deponent of this, writing him on February 4, 1930, as follows:

"The only information that Mr. Martin has is a word that von Lewinski let drop to Mr. Bonynge that the German For gn Office is having trouble with Theodor Wille in the matter of this settlement. Mr. Martin does

not know what phase of the matter they have taken up with Theodor Wille, but apparently there is some question being raised and perhaps the matter has been instituted by Wille.

"Do you suppose that Theodor Wille is enlisting the services of some American counsel in contemplating taking a part in this settlement?"

Deponent in reply then wrote to Mr. Doyle that the trouble seemed to be entirely between Germans without any effort being made to assert any claim by Wille
1193 against Crossman & Sielcken; that deponent had heard of no trace of Wille taking any interest in New York in what was going on, and that deponent had asked von Lewinski if the German Agency had heard of any claim by Wille against Crossman & Sielcken and von Lewinski stated that he had not.

About that time also deponent inquired of Mr. Hays whether he represented Wille and Mr. Hays replied that he did not but that he *might* be retained by Wille.

Deponent then asked Mr. Hays what claim Wille made, or threatened to make, and Mr. Hays was very indefinite about it, and never made an attempt to or did give any
1194 explanation of the nature of any claim that was made by or might exist in favor of Theodor Wille.

On or about the 9th of February, 1930, on continued reports that Dr. von Lewinski was having trouble in getting the release from Wille; negotiations were begun between deponent and Mr. Hays, or his associate, Mr. Abramson, with regard to the creation of a joint fund of $200,000 to be contributed one-half by Z.E.G. and one-half by the plaintiffs in this suit, and to be held in New York, to fight any claim that Wille might advance, and if Wille recovered anything to pay the sum recovered, returning the unexpended balance pro rata to the contributors. Shortly afterwards, about the month of March, Mr. Hays' office informed deponent that the Wille firm had agreed to sign the releases and join in the settlement as arranged, if they were paid the sum of $100,000 and that Z.E.G. would contribute $50,000 of that sum

if the plaintiffs would contribute the other $50,000. That was discussed among the counsel for plaintiffs and for Mrs. Sielcken and with the Trust Company.

No explanation whatsoever was vouchsafed to us as to the nature of this threatened claim and we never have known the nature of the claim Wille was threatening to make.

The terms of settlement agreed on, however, were very much more favorable than we had been authorized to accept and the proffer of Z.E.G. to contribute one-half of the $100,000 to Wille showed that Z.E.G. was also anxious 1196
to conclude the settlement. Wille at this time was, through the German Agent, making efforts to cut down the amount of the award to be made under the Wille Memorial and it was, as we saw it, merely another effort on Wille's part to get a reduction, indirectly, of the amount to be awarded against them under that Memorial, which, of course, had nothing to do with the Z.E.G. claim but was entirely independent.

After some discussion of that question, on March 10, 1930, I wrote to Mr. Bonynge, the American Agent, as follows:

"It has occurred to both Mr. Hays and ourselves 1197
that a complete settlement with Wille might be reached for the sum of $100,000 which we would share. If this were done the necessity would be obviated of making the deposit of $200,000. We are inclined to recommend such a proposal for settlement with Wille to our client, if it meets with your approval.

"Would it not be well to discuss the matter with you and Mr. Martin at an early date at the Commission; and we might also discuss the subject further with Mr. Hays and Dr. von Lewinski. On the other hand, it might be well to defer any discussion until we hear from Germany on the settlement proposed, but, at any rate I thought we should acquaint you with the subject matter of our discussions."

Mr. Bonynge, on March 11, 1930, replied to the above letter of March 10, saying, in part, as follows:

"The Agency is in no way concerned with any claims of the firm of Theodor Wille of Hamburg. Therefore I have no comments to make in reference thereto."

During the conference on March 17th, at which both Mr. Bonynge and Mr. Martin were present (of which Mr. Martin has made minutes), Mr. Bonynge suggested that the meeting suspend and he and Dr. von Lewinski with-
1199 drew for several minutes and then Mr. Bonynge came and said that Dr. von Lewinski would like to have a short conference with me. I asked Mr. Doyle (who was fully acquainted with all the details) to go with me, and we went into another room along with Dr. von Lewinski, Dr. Roth, Mr. Hays and Mr. Abramson. They then brought up the subject of this demand of $100,000 by Wille, concerning which I had written Mr. Bonynge on March 10th, 1930, and concerning which Mr. Bonynge had replied to me, as above, on March 11th, 1930.

Mr. Hays stated that it was going to cost $100,000 to get Wille's releases, and asked would we contribute
1200 $50,000 of that amount to enable him to do so. We then agreed that we would recommend it to our clients, and said we would agree to it, subject to approval of our clients.

We then returned to the conference room and told Mr. Barnes and Mr. Alger what had occurred. We then all consented to the settlement, as shown in Mr. Martin's minutes, and the meeting adjourned.

While the $200,000 proposition was still under discussion, Dr. von Lewinski requested me to call on him at his office in the German Agency in Washington, which I did. The message came to me through Mr. Martin. I said to Mr. Martin: "What shall I do?" He said: "It is unusual for the German Agent to have personal conferences with counsel for claimants whom the American Agent represent except through the Agency, but in view of your previous personal contact with Dr. von Lewinski

in Berlin in 1928, I think it is all right, and you had bet- 1201
ter go and see him," which I did.

Dr. von Lewinski took pains then to explain to me that this assertion of an uncertain claim by Wille, of the nature of which he had no knowledge (but probably to be asserted in Germany against the Sielcken estate there) was a thing of which he had no knowledge, and to which he was not a party; that it was as distasteful to him as it could be to me, but it was a real difficulty, and some solution must be had of it in order to enable the general settlement to go through. He disclaimed having any personal interest in the affair and his only official interest in it was in getting these things cleaned up 1202
and out of the way of the other business of the Commission. He added that this alleged claim of Wille's was not before the Commission in any way.

On the 14th of March, 1930, as I recall it, Dr. von Lewinski was in New York, and at his request I called on him at the office of Mr. Hays and in his presence Mr. Hays dictated the following telegram, which I was requested by Dr. von Lewinski to send over my own name to Mr. Bonynge, the American Agent, which I sent:

"Hon. Robert W. Bonynge,
American Agent,
German Mixed Claims Commission, 1203
Investment Building,
Washington, D. C.

"Dr. von Lewinski transmits through Z.E.G.'s New York lawyer, Mr. Hays, request for meeting Washington, Monday morning, March 17th Stop Modifications of tentative settlement made January 9th are suggested, which include settlement with Theodor Wille Stop Mr. Hays and myself will reach Washington Monday morning unless you wire to the contrary.

BRAINARD AVERY."

At the same time, I telegraphed Mr. Doyle, who was in New Hampshire, of the meeting and we all attended the meeting on March 17th, 1930, as so arranged.

Before we went into conference at Mr. Bonynge's office, at 2:30 on March 17th, Mr. Barnes, Judge Hamel, Mr. Alger, Mr. Doyle and myself had all agreed that it would be wise, if getting the settlement through turned on it, to contribute $50,000 to Mr. Hays of the fund of $100,000, which Hays said he needed to secure the Wille releases.

1205 In view of this threat of Wille to assert against Sielcken's assets in Germany some undisclosed claim or claims, we were absolutely insistent on having releases from Wille that would cover every possible claim that that firm could think of asserting.

I am further informed by Mr. Martin, and believe, that on March 18, 1930, in remitting a copy of his memorandum of the meeting of March 17, 1930, to Mr. Bonynge, Mr. Martin wrote:

"I explained to the parties that the questions of claims that the firm of Theodor Wille might possibly have against Crossman & Sielcken was of no more concern
1206 to the Agency than is the question of the possible claims arising out of the so-called indemnity agreement involved in the Z.E.G. claim and that the Agency was not directly concerned with either of these matters."

I recall Mr. Martin's having so stated at that conference.

Prior to the meeting of March 17th, 1930, and I think at Mr. Hays' office, on March 14th, 1930, a discussion ensued in the course of which it was stated by or on behalf of Mr. Hays that he could secure the execution of the desired release from Wille at a cost of $100,000. We have never known what claim Wille thought of asserting.

About that time Mr. Barnes, Mr. Doyle and I were of the impression, which we then expressed to each other, that this application for $100,000 was in the nature of a "hold-up."

At that time, the German Agency and Z.E.G. and their counsel and Mrs. Sielcken Schwarz and Sorenson and Nielsen and their counsel were anxious to see the settlement go through and the enormous and doubtful litigation that might ensue gotten rid of.

I explained to Mr. Bonynge, the American Agent, personally, this demand for $100,000 and our ignorance of what it was for, but that it seemed to me that it was worthwhile to contribute $50,000 to Mr. Hays, if Z.E.G. would, to see the settlement go through, even without knowing on what ground the claim was made, and that 1208
the settlement, with that $50,000 deducted, would still be within the authority to settle conferred on us by Mrs. Sielcken Schwarz. Mr. Bonynge adhered to the position shown in his letter of March 11th, 1930.

For the above reasons, on behalf of the Memorialists, we consented to the arrangement that $50,000 would be contributed by Crossman & Sielcken in Liquidation to Mr. Hays, if Z.E.G. would contribute an equal amount to him to cover the payment demanded in the name of Theodor Wille as a condition of their executing the release called for from it.

We consulted with Mrs. Sielcken Schwarz as to the ad- 1209
visability of making this payment of $50,000 in order to get the settlement through, and she was of opinion that it was satisfactory to do so and authorized us as far as she was concerned to join in that stipulation.

We then took the matter up with the American executor and upon receiving the consent of Mrs. Sielcken to its doing so, it agreed to that modification of the agreement, to wit, the payment out of the recovery, to Hays for Wille of $50,000 on condition that Z.E.G. would make an equal payment to Theodor Wille.

Just about the same time Dr. von Lewinski reported that the German Foreign Office refused to agree to the 60% proposition as to the Wille award and insisted that it be 50% only. We took that question up in the same way with like result, and then came the meeting of March 17, 1930, at which these latter features were discussed

and set out in the minutes Mr. Martin made of that conference.

We insisted we must have a release from Wille that would cover any possible claim that Wille might assert with regard to the cargoes, or any account. They had repeatedly disclaimed having any such claim, and had asserted that all these matters had been fuly adjusted between them and the firm.

We did not, in the face of their threat to take action, feel willing to rely on anything but a specific release of
1211 any such question, even though Wille had not advanced any definite claim, but we made our demand that the release should be made in such form as to protect the firm and the American Executor and the estate of Sielcken from any possible claim that might be made by Wille. In view of Wille's attitude in the matter we did not trust them and felt in duty bound to make the settlement conclusive.

Even after Wille's agreeing to the settlement, we had much difficulty in getting the releases. We sent over to them proper releases for them to execute, but they changed them so as to leave loopholes and we refused
1212 to accept the altered papers and sent back again the papers we had drafted and insisted that they be executed as drafted by us. They were finally executed.

We have never heard nor been informed in any way what the claim Wille proposed to make was, except the assertion in the most general terms, that if they did not get that $100,000 they were going to start litigation which would be embarrassing to the estate of Sielcken; whether that in Germany or that here they did not say.

No claim was ever made by Theodor Wille that they were entitled to any part of the recovery from Z.E.G. under the judgment herein, but only that they wanted $100,000 to be paid them, half by the plaintiffs and half by Z.E.G.

Although Dr. von Lewinski and ourselves regarded this demand as in the nature of a holdup, we finally agreed to it because the general settlement was so advantageous that we could better afford it than to go on litigating.

The claim presented by the Memorial against Theodor Wille was itself one of very great difficulty. There was first the question whether the bulk of the bonds for which recovery was asked were individual assets of Hermann Sielcken or firm assets of Crossman & Sielcken.

There was next the very serious question whether the bulk of the bonds had ever been purchased or the transaction simply "bucketed" by them, and they had refused to allow an inspection of their books by any accountants of our selection.

There were also very difficult questions as to rates 1214
of exchange to be adopted and of dates from which interest would run.

It was also somewhat uncertain how far the refusal of Wille to turn over the bonds had been compelled by Germany under the special war legislation and how far it had been the individual action of Theodor Wille.

Mr. Sielcken's accounts in Germany had been kept in a most tangled shape and it would have been a matter of prolonged and difficult litigation of uncertain outcome, and we believed the settlement in the shape it finally took most advantageous to the estate.

None of us had at any time any thought of arranging 1215
to get money out of the Treasury of the United States or from the Alien Property Custodian on the basis of getting a consent recovery in this suit on the basis of dividing up the proceeds with Germans. What we were compromising with Z. E. G. was simply the outside claim under the indemnity agreement that had been signed by the German executors, a claim which we regarded most seriously despite the opinion of Dr. Neumann, a copy of which is hereto annexed, marked Exhibit C.

It is our belief that neither Mr. Martin nor Mr. Rhodes have ever felt that there was any disposition shown on our part at any point to withhold from them the fullest information with regard to what was being done as to the compromise of the whole affair. That we were making a settlement they both knew, and, in view of the nature of the claims which we were compromising, they both, as we

understood it, felt that the matter of the compromise we should reach was a matter with which they were not really concerned, but which was the private affair of the firm in liquidation and the estate of Sielcken, which the parties were at liberty to settle in any way on terms that they approved.

At the time the settlement was made, the estate had no ready cash with which to carry out the settlement and for that reason the funds coming in under the judgment were used in making the compromise instead of delaying
1217 until other funds came in, as they did some six weeks later.

The settlement was carried through as arranged in the letter of March 27th, 1930, from Mr. Barnes and myself to Arthur Garfield Hays, Exhibit W of the affidavit of Mr. Sterck, and as shown in the pending account of the executor in the Surrogate's Court for New York County.

Deponent further says that Mr. Sterck, who makes the moving affidavit herein, was entirely unknown to deponent throughout the prosecution of said claims and negotiations for settlement, nor did deponent ever hear of him until the presentation of his affidavit herein. It is depo-
1218 nent's belief that Mr. Sterck has no personal knowledge of any of the matters stated in his affidavit beyond his having found in the files of the Department of Justice copies of some papers which he annexed to his affidavit. These do not support, even unexplained, the conclusions he advances therefrom; and his conclusions are entirely contrary to other documents in the possession of the Department of Justice or readily accessible to it, with which apparently Mr. Sterck had not familiarized himself.

Deponent further says that Mr. George W. Alger (who has been above referred to) was at deponent's place in Vermont some days in July, 1938, and deponent then discussed with him the matter of his making affidavit as to the integrity of the proceedings in the final settlement of the recoveries in this suit and before the Mixed Claims Commission and of the claim of Z. E. G. under its indemnity agreement and the demand of $50,000 for pay-

ment to Theodor Wille for the desired releases, which Mr. Alger said he would be willing to do.

Mr. Alger returned to New York toward the end of July with the understanding that an affidavit satisfactory to him would be prepared and verified by him.

On August 1st, 1938, deponent unexpectedly received from Mr. Alger a note from the steamer "Vulcania," saying:

"This is a surprise. I made up my mind Thursday night when I did not sleep that I should take a trip. 1220
Friday morning I got the last available accommodation on this boat and return on the 'Savoia' about September 1st."

I wrote Mr. Bacon on the first of August, 1938, of my receiving this word, but it was then too late to secure any affidavit from Mr. Alger before August 15th, 1938.

The steamship "Vulcania" had sailed on July 30th, 1938, from New York for the Azores, French Morocco, Gibraltar, Malta, etc., and it was quite impossible to secure any affidavit from Mr. Alger by the 15th instant.

In view of the fact that suggestions are made in the moving affidavit intimating the possibility of bad faith 1221
on the part of counsel representing the plaintiffs in this suit, and Mr. Barnes being dead some years before any such aspersions had been suggested, deponent has thought it only proper that the affidavits of other counsel who were active in the case should be presented in answer to these imputations, and desires that opportunity be afforded to file and serve Mr. Alger's affidavit promptly after his return to this country in September.

The high character and standing of Mr. Barnes was well known to this court and it is my belief that the Court will not lightly accept any challenge of his good faith on the mere inference of any person who had no personal knowledge of the proceedings, and only a very limited knowledge of the documents to which he could readily have had access.

1222 *Exhibit A Annexed to Answering Affidavit of Brainard Avery*

It is for this reason that deponent has presented the foregoing facts and documents as evidence of the real facts of the settlement made.

BRAINARD AVERY.

Subscribed and sworn to before me this
11th day of August, 1938.
James S. Ogsbury, Jr.,
Notary Public,
1223 Nassau Co., N. Y. No. 1870.
Certificate filed in N. Y. Co., No. 180.
N. Y. County Register's No. 0-O-105.
My commission expires March 30, 1940.
(Seal)

Exhibit A Annexed to Answering Affidavit of Brainard Avery.

Alex W. Sielcken
Hoepfner & Sielcken, Ltd.
New York
1224

87 Front Street
May 10th, 1927

Messrs. Barnes, Avery & Whiting,
100 Broadway,
New York City.

Dear Sirs:

I want to refer to your letters of April 2nd, April 6th and May 5th respectively.

In consideration of your examining, filing and prosecuting certain claims (Prize Court cases, Claim for Depreciation of Marks in re Peimann, Ziegler & Co., Wille and the Depreciation of Marks on War Loan Bonds) with the German Mixed Claims Commission and/or any other

Exhibit A Annexed to Answering Affidavit of Brainard Avery 1225

Court or Courts for my account and/or the account of the estate of Herman Sielcken, Dec., I herewith agree to pay you

One Thousand Dollars ($1,000.00) per month for services. This retainer is to include Judge Hamel and Mr. Doyle's firm in Washington, D .C.

It is agreed that this retainer for $1,000—per month shall not run longer than five (5) months and that the total amount paid you under this retainer shall not exceed Five Thousand Dollars ($5,000.—) in total. This 1226
retainer is to include all office expenses, not however including cables and long distance telephones, all other expenses are to be stated monthly.

In case of recovery from the Mixed Claims Commission and/or any other Court or Courts of the claims known as the Prize Court cases, I herewith agree to pay you Twenty (20) per cent of the amount recovered as your fee. In case of recovery in the Peimann Ziegler matter against the Mixed Claims Commission, I herewith agree to pay you twenty-five (25) per cent of the amount recovered. In case of recovery in the action resulting from the depreciation of Marks, which were invested in Ger- 1227
man War Loan Bonds, I agree to pay you twenty (20) per cent of the amount recovered as your fee.

In respect to the above referred to three cases (Prize Court cases, Peimann Ziegler and War Loan Bonds) it is understood that your fee shall only become due you when Germany has finally paid me.

Yours very truly,

CLARA SIELCKEN SCHWARZ,
By ALEX WENDROTH SIELCKEN
Atty.

1228 **Exhibit B Annexed to Answering Affidavit of Brainard Avery.**

(Stempel) No. 198 Anlage A
Zwei M 50Pf.pr.2 Expl.
den 3.Jan. 1918
gez. Unterschrift.

SCHIEDSVERTRAG.

Zwischen der Firma Crossmann & Sielcken, New York, und der Zentral-Einkaufsgesellschaft, Berlin, bestehen
1229 Differenzen über die Abwickelung von Geschäften, die auf Grund der zwischen den Parteien in September/Oktober 1914 getroffenen Abmachungen zur Aus führung gelangt sind. Es handelt sich um die Abladungen, die von der Firma Crossmann & Sielcken mit den Dampfern "United States," "Arkanoas," "Hellig Olav," "Oscar II," "Indianic," "Hilding," "Gunborg" in März/April 1915 von New York nach Kopenhagen für die Z. E. G. gemacht sind. Bezüglich dieser Ladungen, von welchen die ersten 4 im Kopenhagen angekommen waren, aber wieder nach England zurückgefördert worden sind und von welchen die letzten 3 in England beschlagnahmt sind, streiten die
1230 Parteien darüber, wer die Gefahr der Reise zu tragen hat, und ob demgemäss diese Sendungen vonder Z. E. G. zu bezahlen sind oder nicht.

Es ist vereinbart, diese Meinungsverschiedenheiten durch ein Schiedsgericht entscheiden zu lassen. Jede Partei ernennt einen Schiedsrichter; zum 3. Schiedsrichter und Obmann wird der Reichsgerichtsrat Herr. Dr. F. Philippi bestellt. Für alle etwa erforderlich werdenden gerichtlichen Handlungen soll das Landgericht in Hamburg ausschliesslich zuständig sein.

Es ist vereinbart, dass nur je eine der direkt nach England aufgebrachten und der zunächst nach Dänemark gelangten, aber von dort nach England zurückgeschickten Dampferladungen Prozessgegenstand sein soll, mit der Massgabe, dass die Parteien die Entscheidung des Schiedsgerichts auch für die übrigen oben genannten Dampferladungen als verbindlich anerkennen.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1231

Die Z. E. G. soll als Kläger in auftreten und ihre Ansprüche im Wege der Feststellungsklage geltend machen. Die Klage ist gegen Hermann Sielcken Nachlass, vertreten durch die Testamentsvollstrecker, die Herren G. Diederichsen, G. Georgius, Carl Isenberg und Richard Isenberg, zu richten.

Berlin, den 27. Dezember 1917
Zentral-Einkaufsgesellschaft
mit beschränkter Haftung.
gez. Unterschrift
gez. Unterschrift 1232

Hamburg, den
31.Dec.1917.

gez. D. A. Kaemmerer
i.V.der Testamentsvollstrecker
von Herm. Sielcken Testament.

Die Richtigkeit der vorstehenden Abschrift wird beglaubigt.

(Signature.)

Berlin, den 16.Januar 1928. (Seal) 1233
Assessor.

1234 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

Translation.

(Stamp) No. 198
2M 50 Pf.pr.2 Expl.
Jan.3,1918
sgd. Signature.

CONTRACT OF ARBITRATION

1235 Between the firm of Crossman & Sielcken, New York, and the Central Purchasing Corporation, Berlin, there exist differences concerning the winding up of transactions which were carried out under an agreement between the parties arrived at in September/October, 1914. The matter has to do with shipments from New York to Copenhagen, which the firm of Crossman & Sielcken arranged for the Z. E. G. in March/April, 1915, with the steamers "United States," "Arkansas," "Hellig Olav," "Oscar II," "Indianic," "Hilding," "Gunborg." Concerning these shipments, of which the first four arrived in Copenhagen but were returned to England and the
1236 last three were seized in England, the parties are in dispute as to who shall bear the risk of the voyage and whether or not these shipments are to be paid for by the Z. E. G.

It has been agreed that these disputes shall be decided by a court of arbitration. Each party shall appoint an arbiter; Reichsgerichtsrat Dr. F. Philippi is appointed as 3. arbiter and chairman. The District Court at Hamburg shall have exclusive jurisdiction for all court actions which may become necessary.

It has been agreed that only one of the shipments captured and brought directly to England and one brought to Denmark but later returned to England, shall be submitted to the court of arbitration, with the provision that the parties will recognize the decision of the court of arbitration as binding for the other above mentioned shipments.

The Z. E. G. shall be plaintiff and bring suit for the

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1237

establishment of its rights. The suit shall be directed against the estate of Hermann Sielcken, represented by the executors; Messrs. G. Diederichsen, G. Georgius, Carl Isenberg, and Richard Isenberg.

Berlin, December 27, 1917

Central Purchasing Corporation
with limited liability

(Zentral-Einkaufsgesellschaft
mit beschraenkter Haftung) 1238

Sgd. Signature

Sgd. Signature

Hamburg,
Dec.31,1917.

Sgd. D. A. Kaemmerer

For the executors of the
Estate of Herm. Sielcken.

The correctness of the above copy is certified.
Berlin, January 16, 1928 (Seal) Signature 1239
Assessor.

Anlage B

16. Januar 1918.

Da. Rechtsabteilung.
Dr. G. M. Ste.

Herrn Rechtsanwalt Dr. Kaemmerer,

Hamburg
Alter Wall 20.

In Sachen gegen *Sielcken Nachlass* erwidern wir auf Ihr gefälliges Schreiben vom 14. ds. Mts:

Wir haben keine Veranlassung, eine Entscheidung über die Ihrer Ansicht nach für uns ungünstiger als bei der

1240 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

Ladung des Dampfers "Hellig Olav" liegende Frage betreffend Dampfer "United States" für sämtliche von Dänemark nach England zurückgebrachten Ladungen als massgebend anzuerkennen.

Wir können auch Ihre Ansicht nicht teilen, dass der Schiedsvertrag hinfällig ist, weil wir die Klage betreffend eine andere als die von Ihnen gewünschte Ladung erhoben haben. Aber wir wollen Ihren Klienten die Geltendmachung ihrer Rechte nicht aus einem formellen Grunde beschränken und werden die Klage auch auf die Ladung des Dampfers "United States" ausdehnen, wenn zwischen uns Uebereinstimmung darüber erzielt wird, in welchem Umfange der Schiedsspruch für die übrigen nicht der Klage zugrundegelegten Dampferladungen präjudiziell sein soll.

1241

Wir sehen Ihren Vorschlägen hierüber entgegen.

Wir regen an, dass der Schiedsspruch, seine tatsächlichen Feststellungen und seine Begründung auch für die Meinungsverschiedenheiten über die dem Schiedsgericht nicht unterbreiteten Ladungen massgebend sein sollen mit der alleinigen Ausnahme, dass es jeder Partei freisteht, bezüglich dieser Ladungen geltend zu machen, dass besondere von dem dem Schiedsgericht unterbreiteten Tatbestand abweichende Tatbestände vorliegen, welche eine andere entzcheidung rechtfertigen. Die von dem Schiedsgericht etwa festgestellten Grundsätze und die Auslegung dieses Abkommens vom 25.September würden aber in einem späteren Verfahren nicht mehr bemängelt werden dürfen.

1242

Ferner müssten Streitigkeiten über die jenigen Ladungen, welche nicht Gegenstand der jetzigen (durch Mitberücksichtigung der Ladung des Dampfers "United States" zu ergänzenden) Klage sind, von demselben Schiedsgericht entschieden werden, wie das jetzt berufene.

Zentral-Einkaufsgesellschaft
mit beschränkter Haftung
gez: Dr.G.Melchior gez: Vorwerk

Die Richtigkeit der vorstehenden Abschrift wird beglaubigt.

Berlin, den 16. Januar 1928. (Seal) Signature

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1243

Translation

January 16, 1918.

Law Department
Dr. G.M.Ste.

Dr. Kaemmerer, Attorney,

Hamburg 1244
Alter Wall 20.

In the matter against the *Sielcken Estate* we reply as follows to your kind letter of the 14th inst.:

We have no reason to recognize as conclusive for all shipments returned to England from Denmark a decision concerning the steamer "United States" which, in your opinion, is more unfavorable for us than that concerning the shipment of the steamer "Hellig Olav."

We are also unable to share your view that the contract of arbitration is void because we brought suit on a shipment other than the one desired by you. But we do not wish to restrict the rights of your client by a formal argument and we will bring suit also against the steamer "United States" if we can reach an agreement as to what extent the arbitration shall be decisive as precedent for the remaining shipments not included in the law suit. 1245

We await your proposals in this matter.

We suggest that the arbitral decision, its statements as to the facts, and its grounds, shall also be binding with regard to the disputes concerning the shipments not included in the law suit, with the sole exception that it is within the discretion of each party to claim in connection with these shipments that there existed peculiar circumstances differing from those submitted to the arbiter, which justify another decision. The principles which may be established by the court of arbitration and the interpretation of this agreement of September 25th cannot be contested in a later proceeding.

1246 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

Furthermore, disputes concerning the shipments which are not the subject of the instant claim (which will be supplemented by including the shipment of the steamer "United States") shall be decided by the same court of arbitration as that now acting.

Zentral-Einkaufsgesellschaft
mit Beschraenkter Haftung
(Central Purchasing Corporation
with limited liability)

1247

Sgd.: Dr. G. Melchior Sgd.: Vorwerk

The correctness of the above copy is certified.

Berlin, January 16, 1928 (Seal) Signature
Assessor.

Anlage C

Dres. Behn Kaemmerer Baur
1248 Rechtsanwälte
Dr. Max G. A. Predöhl
Rechtsanwalt

Hamburg 11, den 20. Januar 1918.
Alter Wall 20 II

Zentral-Einkaufsgesellschaft m. b. H.
Zentralabteilung,

Berlin W.8.
Behrenstr. 21.

Im Besitze Ihres geehrten Schreibens vom 16.ds. zur Sache Sielcken Nachlass bedaure ich nicht anerkennen zu können, dass Sie in der Lage sein würden meinen Klienten die Geltendmachung ihrer Recht aus formellen Gründen zu beschränken. Im übrigen bin ich aber mit dem Inhalt

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1249

Ihres Schreibens und Ihrer Anregung betr. der Beschränkung der Massgeblichkeit des Schiedsspruchs, so wie Sie es formuliert haben, durchaus einverstanden, sodass es eines besonderen Vorschlags hierüber meinerseits nicht bedarf.

Auf Grund dieser hiermit erzielten Verständigung können Sie meiner Ansicht nach die Klage unbedenklich auf die Ladung der D. "United States" beschränken, wenn Sie dadurch eine wesentliche Kostenersparnis zu erzielen glauben. Ich bin aber auch damit einverstanden, 1250
dass beide Ladungen per D. "United States" und per D. "Hellig Olav" in die Klage aufgenommen werden.

Ich bitte Sie freundlichst, mir die demgemäss abgeänderte Klagschrift wieder zukommen zu lassen. Von dem Obmann habe ich ein Schreiben erhalten, nach welchem ich die Klagbeantwortung bis 9.Februar einreichen soll und werde ich, wenn es mir möglich ist, diese Frist einhalten.

Hochachtungsvoll
Dres BEHN KAEMMERER BAUR.
gez. Kaemmerer

1251

1252 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

Translation

2/12

Dres. Behn Kaemmerer Baur
Attorneys at Law

Dr. Max G. A. Predoehl
Attorney at Law

Hamburg 11, January 20, 1918,
Alter Wall 20 II.

1253 Zentral-Einkaufsgesellschaft m. b. H.
Central Department,

Berlin W.8.

Behrenstr. 21.

I am in receipt of your favor of the 16th inst. Concerning the matter of the Sielcken Estate, I regret not to be able to recognize that you would be in a position to limit the claim of my clients on account of formal reasons. But otherwise I agree with the contents of your letter and your suggestion concerning the limitation of
1254 the competence of the arbitration, so that another proposition in this respect on my part is unnecessary.

On account of this agreement reached by us, you may, in my opinion, limit the law suit without hesitation to the shipment of the steamer "United States" if you think that considerable expense will thereby be saved. However, I also agree that both shipments of the steamers "United States" and "Hellig Olav" be included in the law suit.

I request you kindly to return the changed writ of complaint. I have received a letter from the chairman, according to which I have until February 9th to file the answer to the writ of complaint, and I shall observe this time limit if possible.

Respectfully

Dres BEHN KAEMMERER BAUR.
Sgd. Kaemmerer.

The correctness of the above copy is certified.

Berlin, January 16, 1928. (Seal) Sgd. Signature
Assessor.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1255

Exhibit a.

(Stempel Abgabe Hamburg)

SCHIEDSSPRUCH.

in Sachen

der Zentral-Einkaufsgesellschaft zu Berlin, vertreten durch die Geschäftsführer: Herrn Dr. Georg Melchior und Herrn Carl Vorwerk,

Klägerin 1256

gegen

die Testamentsvollstrecker des verstorbenen Hermann Sielcken

nämlich die Herren: C. Diedrichsen, G. Georgius, Carl Isenberg und Richard Isenberg,

diese vertreten durch den Rechtsanwalt Herrn Dr. A. Kaemmerer zu Hamburg,

Beklagte.

Das von den Parteien berufene Schiedsgericht bestehend aus: 1257

Senatspräsidenten Dr. F. Philippi,

den Rechtsanwälten: Justizrat Dr. Reimer

und Dr. Kiesselbach,

erlässt folgenden Spruch, der zu Hamburg am 31. Mai 1918 in der gemeinsamen Beratung beschlossen und abgefasst ist:

I. Teilentscheidung:

Es wird festgestellte, dass die Klägerin nicht verpflichtet ist, den Beklagten für die von der Firma Crossman & Sielcken von New-York nach Kopenhagen am 12. April 1915 mit dem Dampfer Gunborg verladenen 500 Kisten Speck und 1500 Kisten Zerealien Zahlung zu leisten.

1258 *Exhibit B Annexed to Answering Affidavit of Leonard Avery*

II. durch Zwischenentscheidung:

Es wird festgestellt, dass die Gefahr der Reise und insbesondere der auf der Reise erfolgten Beschlagnahme der am 11. März 1915 mit dem Dampfer "United States" verladenen 210 Fässer Schmalz und 225 Kisten Speck und der am 31. März 1915 mit dem Dampfer Hellgi Olaf verladenen 500 Kisten Speck die Verkäuferin trifft.

1259 III. Beschluss:

Die Parteien haben weiter aufzuklären:

1. welchen genaueren Inhalt die den Kapitänen oder Redereien der Dampfer hinsichtlich der streitigen Waren von den Engländern aufgelegte Verpflichtung gehabt hat.

2. ob es möglich gewesen wäre eine Auslieferung der Waren in Kopenhagen zu erwirken.

3. was zu diesem Zwecke von beiden Parteien getan ist und aus welchem Grunde ihre Bemühungen erfolglos geblieben sind.

1260 TATBESTAND.

Zwischen dem Reichseinkauf, dessen Nachfolgerin die Klägerin ist, und dem New-Yorker Handelshause Crossman & Sielcken, dessen persön lich haftender Teilhaber der verstorbene Hermann Sielcken war, ist der in dem Briefe des Unterstaatssekretärs Herrn Dr. Richter vom 25. September 1914 bestätigte Vertrag geschlossen worden. Dieser für den Inahlt des Vertrages massgebliche Brief lautet:

"Euer Hochwohlgeboren bestätige ich, dass der Reichseinkauf in Hamburg beauftrag ist, gemichte Ladungen von Weizen, Tee, Kako, Kraftfuttermitteln bis zum Werte von M 600 000.-für jede Schiffsladung die auf neutralen Schiffen von amerikanischen Häfen nach neutralen Häfen der Ostsee abgeladen werden, im Ostseehafen abzunehmen. Der Reichseinkauf wird hierfür den Wert der Ladung cif Ostseehafen (Fakturenwert zuzüglich Fracht und Verzicherungsspesen)

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1261

und 10% Provision von diesem Werte, zahlen. Zahlung erfolgt bei Ankunft der Ware und Auslieferung der Konnossemente im Bestimmungshafen etc."

Auf Grund diesses Abkommens haben Crossman & Sielcken mit einer Anzahl neutraler Dampfer nach neutralen Ostssehäfen vornehmlich nach Kopenhagen, Waren abgeladen, von denen ein Teil glücklich angekommen und von der Klägerin abgenommen, ein anderer Teil von den Engländern aufgebracht oder beschlagnahmt ist. Die 1262
Parteien streiten über die mit den Dampfern "United States," "Hellig Olaf" und "Gunborg" geschehenen Abladungen. Die Konnossemente über diese Waren sind auf Harry Levin zu Kopenhagen ausgestellt, der nach Anweisung der Vertreter von Crossmann & Sielcken mit ihnen zu verfahren hatte.

Die beiden Dampfer United States und Hellig Olaf sind am 11. und 31. März von New-York abgegangen. Die ersten Anzeigen von den mit ihnen erfolgten Abladungen sind der Klägerin bezüglich der United States durch den Brief Anlage 8, d.d. Hamburg, den 28. März, besüglich der Hellig Olaf durch das Telegramm Anlage 16 vom 21. April erstattet worden. Bei-de Dampfer sind auch mit 1263
der Ladung—und zwar am 27. März und 17. April—in Kopenhagen eingetroffen. Sie waren aber auf der Reise von den Engländern angehalten und nur gegen bestimmte Verpflichtungen losgelassen worden. Unsicher ist, ob die Verpflichtung der Reederei dahin gegangen ist, die Ware nach England zurückzubringen, wenn nicht dargetan werde, dass sie in Dänemark verzehrt werde, oder dahin, dass sie schlechthin nach England zurückgebracht werden müsse. Jedenfalls hat die Reederei wegen der eingegangenen Verbindlichkeit die Auslieferung der Waren verweigert. Sie sind schliesslich nach England zurückgebracht und dort kondemniert worden.

Der dritte Dampfer Gunborg ist am 12. April von New-York abgegangen. Die geschehene Abladung ist der Klägerin durch das Telegramm vom 21. April (Anlage 16) angezeigt. Der Dampfer ist von den Engländern genommen und nicht nach Kopenhagen gelangt. Die Ware

1264 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

ist obenso wie die früheren Abladungen kondemniert worden.

Die Parteien streiten darüber, wer den Verlust zu tragen hat.

Die Klägerin beantragt:

festzustellen, dass sie nicht verpflichtet ist, den Beklagten für die von der Firma Crossmann & Sielcken von New-York nach Kopenhagen;

am 11. März 1915 mit dem D. "United States" verlad-
1265 enen 210 Fässer Schmalz und 255 Kisten Speck;

am 31. März 1915 mit dem D. "Hellig Olaf" verladenen 500 Kisten Speck und 1500 Kisten Zerealien, Zahlung zu leisten.

Die Beklagten beantragen, die Klage abzuweisen.

Der Streit ist schriftlich in der Klagschrift nebst Nachtrag, der Klagbeantwortung, Replik und Schriftsatz der Beklagten vom 24. April 1918 verhandelt. Die Klägerin hat weiter mtt Schriftsatz vom 22. April eine Anzahl von Urteilen, Gutachten und anderen Schriftstücken überreicht, welche die dänische Rechtsprechung über die Pflicht der Reedereien zur Auslieferung von Waren, die
1266 von den Engländern so, wie hier im Falle der D. United States und Hellig Olaf geschehen, beschlagnahnt sind, betreffen.

Gemäss der Auflage des Vorsitzenden haben die Parteivertreter sich ferner durch ihre Schriftsätze vom 23. und 28. Mai erklärt.

Schliesslich ist der gesamte Streitstoff in mündlicher Verhandlung erörtert, wobei von der Klägerin noch zwei Briefe Bruhns vom 20. und 18. April 1915, die Rechnung über die mit der United States verladenen Waren und eine Aufstellung über den Weg, den die Konnossemente genommen haben, vorgelegt sind.

Der Anwalt der Beklagten hat darauf hingewiesen, dase es ungewiss sei, ob die Klägerin nicht durch geeignete Massnahmen die Ueberführung der Waren nach England hätte hindern können.

Auf Grund des gesamten Materials hat das Schiedsgericht seinen Spruch gefällt:

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1267

GRUENDE:

I. Zurückzuweisen ist zunächst der Gedanke der Beklagten, dass es sich um eine dem Hause Crossmann & Sielcken von dem Reichseinkauf erteilte Einkaufskommission handelt. Wenn auch der Preis auf den Einstandspreis zuzüglich einer Provision von 10% festgesetzt ist, so ist daraus doch keineswegs zu schliessen, dass Crossmann & Sielcken als Kommissionäre des Reichseinkaufs tätig werden sollten. Wäre dies die Meinung gewesen, so 1268
wäre jedes einzelne von Crossmann & Sielcken im Hinblick auf den streitigen Vertrag geschlossene Geschäft, es wären also die einzelnen Einkäufe, die Fracht-und Lagerverträge in den Vereinigten Staaten schliesslich die Seefrachtverträge von Anfang an für Rechnung des Reischseinkaufs gegangen und hätten unverzüglich angezeigt werden müssen. Der Reichseinkauf hätte auch das Recht gehabt, die für seine Rechnung eingekauften Waren schon in Amerika abzunnehmen. Andererseitz wären Crossmann & Sielcken berechtigt gewesen, dem Reichseinkauf die Waren daselbst sur Verfügung zu stellen, wenn etwa wegen der Kriegsläufte, z.B. Ausfuhr- 1269
verboten, eine Verschiffung vorzeitig unmöglich geworden wäre. An alles dies hat man offenbar nicht gedacht. Vielmehr sollten Crossmann & Sielcken dem Reichseinkauf Waren der verabredeten Art übergeben und ihm das Eigentum daran verschaffen, wogegen sie als Entgelt den Einstandspreis zuzüglich 10% Gewinn erhalten sollten. Es war also Kauf beabsichtigt.

II. Freilich ist lt. der Bestätigung vom 25. September auch kein vollständiger, beiderseits verpflichtender Kauf abgeschlossen worden. Der Reichseinkauf hat sich verpflichtet, Waren der verabredeten Art, die Crossmann & Sielcken ihm auf die festgesetzte Weise liefern würden, abzunehmen und mit einem nach dem vereinbarten Grundsätzen zu berechnenden Preise zu bezahlen. Er hat also ein für längere Zeit verbindliches Kaufangebot gestellt. Crossmann & Sielcken haben sich aber im September 1915 zu nichts verpflichtet. Falls sie es nicht für

1270 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

angezeigt hielten, überhaupt Waren abzuladen, so konnten Sie nach dem Vertrage nicht dazu angehalten werden. Sie waren auch nicht gehindert, an andere europäische Käufer in gleicher Weise wie an den Reichseinkauf zu liefern, durften also Waren der in dem Briefe vom 25. September bezeichneten Art, die sie nach neutralen Ostseehäfen abluden, dritten Personen anbieten und liefern. Erst wenn Sie dem Reichseinkauf anzeigten, dass sie ihm bestimmte Waren auf Grund seines Kaufangebotes liefern
1271 würden, oder bereits für ihn abgeladen hätten, wurde ein Kauf zwischen beiden Teilen perfekt. Daraus folgt, dass keineswegs vor solcher Andienung die Gefahr einer bestimmten Ladung aur die Klägerin übergegangen sein kann. Denn es ist undenkbar, dass der Käufer die Gefahr einer bestimmten Sache zu tragen hätte, bevor überhaupt eine bestimmte Sache bindend bezeichnet ist, die er abzunehmen und die der Käufer zu liefern ver Pflichete wäre.

Bezüglich der Abladung der United States und Hellig Olaf kann hiernach die Gefahr der Reise nicht auf die Klägerin übergegangen sein, wie immer man den Vertrag
1272 vom 25. September auslegen mag. Crossmann & Sielcken hatten die Ware an die Adresse von Harry Levin in Kopenhagen abgeladen. Dieser war ihr Vertreter, nicht der der Klägerin, wenn er ihnen auch von dieser als geeignete Person vorgeschlagen sein mag. Das ergibt sich ganz klar aus den vorgelegten Anlagen 7-9 und 4, wonach Levin die Konnossemente von der Vertreterin der Verkäuferin erhielt, um nach ihrer Anweisung damit zu verfahren und sie in deren Auftrage an den Vertreter der Klägerin, Daniel Bruhn, übergeben hat. Auch der Brief des verstorbenen Herrn Sielcken vom 29. Mai 1915 (Anlage 4) zeigt, dass er Levin als seinen Vertreter behandelt hat. Die Uebersendung der Konnossemente an Levin war demnach keine an die Klägerin gerichtete Andienung der Ware. Diese ist vielmehr bezüglich der Ware der United States der Klägerin zuerst mit dem aus Hamburg datierten Briefe vom 28. März-Anlage 8-zugegangen. Vorher hat Klägerin von dieser Abladung nichts erfahren.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1273

Da der Dampfer schon am 27. März in Kopenhagen eingetroffen war, wusste am 28. März, wenn nicht der Hamburger Vertreter der Verkäuferin, so jedenfalls ihr Kopenhagener Vertreter Levin um die geschehene Beschlagnahme. Die erste Anzeige von der Abladung der Hellig Olaf, die am 17. April in Kopenhagen eingetroffen war, hat die Verkäuferin der Käuferin erst mit dem Telegramm vom 21. April-Anlage 16-erstattet, nachdem der Absender Herr Sielcken zugestandener Massen durch Levin von der Beschlagnahme benachtichtigt war. Die Verkäuferin hat 1274
also beide Partien der Käuferin erst angedient, nachdem die Beschlagnahme nicht nur geschehen, sondern auch den europäischen Vertretern der Käuferin bekannt geworden war. Dies war unberechtigt. Waren, die bereits von einer feindlichen Kriegsmassregel betroffen waren, welche die Gefahr gänzlichen Verlustes sehr nahe brachte und jedenfalls die Käuferin an der freien Verfügung über die Ware hinderte, durfte die Verkäuferin nicht der Käuferin auf deren verbindliches Kaufangebot andienen.

Klägerin wäre also berechtigt gewesen, die Konnossemente und die Ware sofort zurückzuweisen, auch wenn man den Vertrag mit der Beklagten vom 25. September 1275
dahin auszulegen hätte, dass die Käuferin die Gefahr der Reise zu tragen hatte.

III. Zudem musste aber diese Auslegung für unrichtig erachtet werden.

Dass der Reichseinkauf die Absicht und Meinung gehabt hat, nicht auf Abladung von den Vereinigten Staaten, sondern auf Lieferung im Ostseehafen abzuschliessen, ist aus dem Telegramm des Unterstaatsekretärs Richter vom 25. Sept. und dem Bericht des Geheimrats Frisch vom 23. September 1915 mit grosser Wahrscheinlichkeit zu entnehmen. Dies ist zwar nicht entscheidend, weil es sich um interne Aeusserungen im Kreise der Käuferin handelt, nur wenn, wie behauptet ist, Herr Ballin das genannte Telegramm seinem ganzen Inhalte nach Herrn Sielcken mitgeteilt haben sollte, würde hierauf Gewicht zu legen sein. Abgesehen hiervon ist nur der Inhalt des Bestätigungsbriefes entscheidend, wie er nach seiner Wortfas-

1276 *Exhibit B Annexed to Answering Affidavit of Brainard Avery.*

sung, dem Umständen des Falles und dem Wesen der ganzen wirtschaftlichen Transaktion verstanden werden muss.

Allerdings war die Verkäuferin ein zu New-York ansässiges Handelshaus und sie hatte folglich daselbst zu erfüllen, wenn ein anderer Ort weder von den Parteien für die Lastung bestimmt war, noch aus den Umständen zu entnehmen war.

Das Schiedsgericht hat aber unter Berücksichtigung
1277 aller Umstände den Bestätigungsbrief dahin verstehen Müssen, dass die Lieferung abseiten der Verkäuferin im Bestimmungshafen geschehen sollte.

Zunächst fällt die Höhe der bedungenen Provision für keine Seite ins Gewicht. Allerdings hatte der Reichseinkauf der Verkäuferin eine Provision von 10%, vielleicht auch bei Lieferung ab New-York zugestehen können, weil es für ihn von Vorteil war, mit einem zuverlässigen und potenten Hause, dem auch alle Gelegenheiten zu günstigem Einkaufe offenstanden, abzuschliessen. Andererseits können Crossmann & Sielcken auch sehr wohl bie Lieferung in Kopenhagen mit einem Zwischengewinne von 10%
1278 zufireden gewesen sein. Es ist dabei zu berücksichtigen, dass der Abschluss im Sommer 1914, also im Anfang des Krieges erfolgt ist und die Gefahr des Transportes damals vielleicht von ihr nicht sehr hoch eingeschätzt wurde, zumal sie sich durch die Kriegsversicherung, deren Kosten ihr erstattet werden sollten, genügend gedeckt erachtet haben mag. Jedenfalls konnte der Reichseinkauf aus der Höhe der Provision nicht schliessen, dass die Verkäuferin nur in New-York liefern und die Gefahr der Reise nicht tragen wollte. Die Höhe der Provision ist also für die Entscheidung unerheblich.

Ohne Grund berufen sich ferner die Beklagten für ihre Auslegung auf den Gebrauch der Abkürzung cif. Wird im typischen Abladegeschäft der Preis unter Verwendung der sog. Cif-Klausel bestimmt, so wird damit bedungen, dass gegen den in bestimmter Summe festgesetzten Kaufpreis der Verkäufer nicht nur die Ware zu liefern, sondern neben dieser hauptsächlichen Leistung noch die

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Kosten der Versicherung und der Fracht bis zum Bestimmungshafen zu tragen hat. Dies weist allerdings darauf hin, dass der Verkäufer seine Lieferpflicht schon im Abladeplatze erfüllt und folglich der Gefahr der Reise nicht trägt; denn hätte er erst im Bestimmungshafen zu liefern, so wäre es selbstverständlich und bedürfte keiner Erwähnung, dass die Kosten der Reise bis dahin ihm zur Last fallen.

In Streitfall ist aber die Abkürzung cif im völlig anderen Zusammenhange verwandt. Der Kaufpreis ist nicht 1280
in fester Summe bedungen, sondern er soll in der Weise verechnet werden, dass der Einstandspreis festgestellt und zu diesem ein Gewinn von 10% zugeschlagen wird. Als Einstandspreis soll aber der Betrag auf den die Ware der Verkäuferin in Kopenhagen zu stehen kommt (nämlich der Fakturenwert zuzüglich der Fracht und der Versicherungskosten bis zum Bestimmungshafen) zu Grunde gelegt werden. Nur dies ist mit dem Ausdruck "Wert der Ladung *cif* Ostseehafen" gemeint—der in diesem Zusammenhange nichts anderes bedeutet, als Wert der Ladung *im* Ostseehafen—. Als Wert der vertraglichen Leistung, auf den die Verkäuferin 10% verdienen 1281
soll, ist also derWert im Ostseehafen angenommen. Dies weist auf das stärkste darauf hin, dass als vertragliche Leistung die Lieferungim Ostseehafen angesehen ist.

Damit stimmt es durchaus, dass der Reichseinkauf verpflichtet sein sollte, die Ware im Ostseehafen abzunehmen. Freilich kann die Abnahme einer gekauften Ware auch an einem anderen Orte als am Erfüllungsorte des Verkäufers stattfinden. Wenn aber, wie im Streitfalle die Verbindlichkeit des Käufers dahin bestimmt ist, dass er die Ware im Bestimmungshafen abnehmen und sie daselbst nach ihrer Ankunft gegen die Konnossemente mit einem Preise bezahlen soll, der dem Einstandspreise im Bestimmungshafen zuzüglich eines dem Verkäufer zugestandenen Verdienstes entspricht, so führt das ungekünstelte Verständnis dieser Abrede dahin, dass der Verkäufer diejenige Leistung zu prästieren hatte, nach deren Wert sein Entgelt berechnet wurde,—nämlich Lieferung im Bestimmungs-

hafen—und dass der Ort der Abnahme der Ware, der sich ja aus den Abreden über die Verschiffung von selbst ergab, im Vertrage besonders hervorgehoben ist, weil er mit dem Erfüllungsorte des Verkaüfers, der häufig in Verträgen festgestellt wird, zusammenfallen sollte.

Gegen dieses Verständnis des Bestätigungsbriefes lässt sich auch aus dem späteren Verfahren der parteien nichts entnehmen. Nachdem die Ankunft und die Beschlagnahme der mit den D. "United States" und "Hellig Olaf"
1283 verladenen Waren bekannt geworden war, haben beide Parteien sich um die Freigabe bemüht. Wenn unter solchen Umständen Herr Volckens am 29. April an Herrn Boening telegraphiert: "Sielcken gewiss gern bereit alles mögliche in *Ihrem* Interesse zu tun, um *Ihnen* zu helfen," so ist es nicht einmal klar, dass der Absender damit bewusst hat ausdrücken wollen, dass allein das Interesse der Klägerin gefährdet sei; noch weniger ist es sicher, dass der Empfänger das Telegramm so verstanden hat. Vor allem handelt es sich um eine rechtlich unerheblich Redewendung, über die man hinweglesen konnte und die keinen Widerspruch nötig machte, wenn sie unzutreffend
1284 war. Hinzu kommt der Inhalt des von Herrn Sielcken am 29. Mai an Levin gerichteten Briefes. Er teilt mit, *seine* Firma ha be es arrangiert, dass die gesamte vonihr verschiffte Ware in Skandinavien bleibe und fordert Levin unter Zusage einer Kommission von 5% auf, die Ware in Dänemark oder auch in England zu verkaufen, Das kann den Anschein erwecken, dass er sein Haus für den Eigentümer der Ware, oder doch für denjenigen, den die Gefahrt traf, hielt. Dem gegenüber verschlägt es auch nichts, dass die Klägerin die Konnossemente der United States und der Hellig Olaf angenommen, die Ladung der United States sogar bezahlt hat, obwohl sie um die Beschlagnahme wusste. Das Schiedsgericht ist Uberzeugt, dass die Klägerin so nur in der Erwartunggehandelt hat, die Ware freimachen zu können, und dass sie ebenso ie Sielcken, sich nur geminschaftlich bemüht hat, androhenden Schaden im beiderseitigen Interesse abzuwenden, ihre gegensäztlichen Rechtsanschauungen aber erst später geltend gemacht hat.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1285

Unter diesen Umständen muss das Schiedsgericht den streitigen Vertrag auf Grund des ungekünstelten Verständnisses des Bestätigungsbriefes dahin auslegen, dass, wie die Bezahlung, so auch die Lieferung der zu verkaufenden Ware im Bestimmungshafen erfolgen sollte, wonach die Käuferin die Gefahr der Reise zu tragen hat.

IV. Hinsichtlich der mit der Gunborg verladenen Ware entscheidet dies den Streit ohne weiteres zu Gunsten der Klägerin. Diese Waren, die am 12. April von New-York abgegangen waren, sind der Klägerin am 21. April durch das Telegramm Anlage 16 angedient worden; sie sind also Gegenstand eines Kaufsgeschäftes zwischen den Parteien geworden, sie sind aber auf der Reise vorlorengegangen, konnten also nicht geliefert werden. Die Klägerin ist deswegen auch nicht verpflichtet, sie zu bezahlen. 1286

V. Hinsichtlich der Abladungen mit den Dampfern United States und Hellig Olaf ist grundsätzlich ebenso zu entscheiden. Hier steht in erster Linie der unter II— dargelegte Grund.

Diese Abladungen sind den Beklagten zuerst am 28. März und 21. April 1915 nach ihrer Ankunft in Kopenhagen angezeigt worden. Die Verkäuferin war aber nicht berechtigt, auf das verbindliche Kaufangebot der Klägerin vom 25. September 1914 Waren anzudienen, welche, wie ihr europäischer Vertreter wusste, mit der englischen Beschlagnahme belastet waren und zu deren Herausgabe die Reederei infolgedessen nicht genötigt werden konnte. 1287

Ausserdem führt aber die unter III. gebilligte Auslegung des Vertrages dazu, dass die Verkäuferin die Folgen der Beschlagnahme tragen muss. Die Verkäuferin hatte zu Kopenhagen zu liefern und hatte folglich die Gefahr der Reise zu tragen. Sind die Waren auch körperlich unverletzt in Kopenhagen angekommen, so waren sie doch auf der Reise von der Beschlagnahme betroffen. Die Gefahr dieses Ereignisses fällt also der Verkäuferin zur Last. Konnte die Reederei wegen der Beschlagnahme nicht zur Herausgabe der Waren genötigt werden, so konnte die Verkäuferin nicht liefern und hat folglich keinen Anspruch auf den Preis.

1288 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

VI. Auch bezüglich der Abladungen United States und Hellig Olaf wäre die Sache hiernach zur Entscheidung reif, wenn die Klägerin die Konnossemente sofort zurückgewiesen hätte. Sie hat jedoch die Konnossemente über beide Abladungen entgegengenommen und—wie es besonders nach dem Briefe Bruhns vom 20. April 1915 (Anlage 19) den Anschein hat—sich damit befasst, die Freigabe der Waren zu erwirken, anstatt dieselgen zurückzugeben und ihren ablehnenden standpunkt klar zum Ausdruck zu
1289 bringen. Aus welchen Gründen ihre Bemühungen keinen Erfolg gehabt haben, hat bisher keine Partei klargestellt. Die von der Klägerin beigebrachten Urteile dänischer Gerichte ergeben allerdings, dass ein gerichtlicher Zwang gegen die Reederei nicht mit Aussicht auf Erfolg versucht werden konnte. Unklar ist aber geblieben, ob durch sofortige Beibringung einer Erklärung, dass die Ware in Dänemark bleiben werde, (betr. home consumption) wie schon der an Anlage 19 angeheftete Brief vom 18. April sie erwähnt, eine Aufhebung der Beschlagnahme und eine freiwillige Auslieferung abseiten der Reederei hätte erwirkt werden können. Falls dies möglich gewesen wäre
1290 und falls es auf irgendwelche Fehler der Klägerin zurückzuführen wäre, dass die Ware nicht ausgeliefert worden, sondern nach England gebracht ist, so würde Klägerin die Schadensfolgen zu tragen haben.

Demzufolge ist noch weitere Aufklärung zu diesem Punkte gefordert.

Der Mitschiedsgerichter Dr. Kiesselbach wird mit der Zustellung und Hinterlegung des Schiedsspruches beauftragt.

gez. Dr. F. Philippi gez. Dr. Reimer. gez. Dr. Kiesselbach.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1291

TRANSLATION

(Revenue Office
Hamburg)

ARBITRAL DECISION

IN THE MATTER
of 1292

The ZENTRAL - EINKAUFSGESELLSCHAFT OF BERLIN, represented by its Managers: Dr. Georg. Melchior and Mr. Carl Vorwerk,
Plaintiff,

against

The Executors of the Estate of Hermann Sielcken, deceased, to wit: MESSRS. C. DIEDRICHSEN, G. GEORGIUS, CARL ISENBERG and RICHARD ISENBERG, represented by Dr. A. Kaemmerer, Attorney at Law, of Hamburg, 1293
Defendant.

The court of arbitration, to which the claim has been referred by the parties and which consists of the President of the Senate, Dr. F. Philippi, and the attorneys Justizrat Dr. Reimer and Dr. Kiesselbach, issue the following decree which was decided on and drafted in consultation at Hamburg on May 31, 1918:

I. Partial Decision:

It is established that the plaintiff is not obligated to make payment to the defendant for the 500 boxes of lard and 1500 boxes of cereals shipped by the firm of Crossman & Sielcken of New York to Copenhagen on April 12, 1915, by the steamer Gunborg.

1294 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

II. By way of Interlocutory Decision:

It is established that the risk of the voyage, and in particular the risk of the seizure of the 210 barrels of grease and 225 boxes of lard which were shipped on March 11, 1915, by the steamer "United States," and of the 500 boxes of lard shipped by the steamer Hellig Olaf on March 31, 1915, is to be borne by the seller.

III. Order.

1295 The parties are requested to clear up the following points:

1. What was the exact nature of the obligations imposed by the British upon the captains or owners of the steamers with regard to the merchandise in dispute.

2. Would it have been possible to obtain delivery of the merchandise at Copenhagen.

3. What steps were taken by both parties for that purpose and for what reason their endeavors remained unsuccessful.

1296 STATEMENT AS TO FACTS.

Between the Reichseinkauf, of which claimant is the successor, and the New York commercial house, Crossman & Sielcken, of which Hermann Sielcken, deceased, was the personally liable partner, a contract has been concluded, as confirmed by the letter of Undersecretary of State Dr. Richter under date of September 25, 1914. This letter, which is decisive with regard to the contents of the contract, reads as follows:

"I have the honor to confirm that the Reichseinkauf at Hamburg has been ordered to accept delivery at Baltic ports of mixed cargoes of wheat, tea, cocoa, cattle fodder, up to the value of M.600,000.— for each shipment, which cargoes should be shipped on neutral vessels from American harbors to neutral ports on the Baltic Sea. The Reichseinkauf shall pay therefor the value of the cargo

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1297

cif Baltic port (net value plus freight and insurance charges) and 10% commission on this value. Payment shall be made upon arrival of the merchandise and delivery "of the bills-of-lading at the port of destination, etc." On the basis of this agreement Crossmann & Sielcken have shipped merchandise by a number of neutral steamers to neutral ports on the Baltic Sea, primarily to Copenhagen, part of which merchandise has arrived safely and has been accepted by the plaintiff, while another part has been captured or seized by the British. 1298
The parties are in controversy regarding the shipments made by the steamers "United States," "Hellig Olaf" and "Gunborg." The bills-of-lading covering this merchandise were made out to Harry Levin of Copenhagen, who had to handle them according to advices of the representative of Crossmann & Sielcken.

The two steamers United States and Hellig Olaf sailed from New York on March 11th and 31st, respectively. The first notice of the shipment made by these steamers was given to the plaintiff with regard to the United States by letter (Exhibit 8), dated Hamburg, March 28th; with regard to the Hellig Olaf by telegram (Exhibit 16) of April 21st. Both steamers arrived with cargo in Copen- 1299
hagen, viz.: on March 27th and April 17th, respectively. During the voyage, however, they had been stopped by the British and had been released only upon certain assurances. It is not established whether the obligation assumed by the ship owners was to the effect that the merchandise should be returned to England unless it were shown that it would be consumed in Denmark, or to the effect that it had to be returned to England anyhow. In any event, the ship owners refused delivery of the cargo on account of the obligation undertaken. Finally, the merchandise was returned to England and there condemned.

The third steamer, Gunborg, sailed from New York on April 12th. The shipment was notified to plaintiff by telegram of April 21st (Exhibit 16). The steamer was seized by the British and did not arrive at Copenhagen. The cargo was condemned in the same way as the prior shipments.

1300 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

The parties are in dispute as to who shall bear the loss.

"The plaintiff petitions that it be established that it is not obligated to make payment to the defendant for 210 barrels of grease and 255 boxes of lard shipped by the firm of Crossmann & Sielcken from New York to Copenhagen, on March 11, 1915, by the SS 'United States,' and for 500 boxes of lard and 1500 boxes of cereals shipped on March 31, 1915, by
1301 the SS "Hellig, Olaf."

The defendants petition that the claim be dismissed.

The dispute has been discussed in the writ of complaint with supplements, in the answer, in the reply, and in the written argument of the defendants of April 24, 1918. Furthermore, the plaintiff, with a written argument of April 22nd, has submitted a number of decisions, opinions, and other documents referring to the Danish jurisprudence with regard to the obligation of ship owners to deliver merchandise which was seized by the British in the same way as here, in the cases of the SS United States and Hellig Olaf.

1302 In accordance with a request of the chairman, the representatives of the parties have made further declarations in written arguments of May 23 and 28.

Finally, the whole subject-matter of the dispute has been discussed in an oral argument, on which occasion the plaintiff submitted two letters from Bruhn of April 20th and 18th, 1915, the invoice covering the merchandise shipped on the United States, and a statement of the route taken by the bills of lading.

The attorney for the defendants has argued that it is uncertain whether the plaintiff might not have prevented the transfer of the merchandise to England by appropriate measures.

On the basis of the complete material, the court of arbitration has entered its decree:

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1303

GROUNDS:

I. First of all, the construction of the defendants, according to which the firm of Crossmann & Sielcken was acting under a purchasing agency on behalf of the Reichseinkauf, must be dismissed. Although the price was set at the net price plus a commission of 10%, it cannot be deduced therefrom that Crossman & Sielcken were to act as purchasing agents of the Reischseinkauf. If that had been the intention, each piece of business transacted under 1304
the contract disputed, and therefore every individual purchase as well as the freight and storage contracts in the United States and, finally, the shipping contracts, would have been made, from the outset, for the account of the Reichseinkauf and would have had to be reported immediately. In that event, the Reichseinkauf would have had the right to accept delivery of the merchandise purchased for its account prior to shipment from America. On the other hand, Crossman & Sielcken would have had the right to place the merchandise at the disposal of the Reichseinkauf in America, for instance in case shipment had become impossible owing to warlike events, such as a prohibition of export. All that was obviously not con- 1305
templated. On the contrary, Crossman & Sielcken were to turn over to the Reichseinkauf merchandise of the character agreed upon and to transfer title therein, whereupon they became entitled, as compensation, to the net price plus 10% profit. A contract of sale was, therefore, contemplated.

II. According to the confirmation of September 25th, it is true that there was not concluded a complete contract of sale binding upon both parties. The Reichseinkauf assumed the obligation to accept merchandise of the character agreed on, which would be furnished by Crossmann & Sielcken in the manner established, and to pay a price to be calculated according to the principles agreed on. The Reichseinkauf thereby made an offer of purchase binding for a certain period. However, Crossmann & Sielcken did not undertake any obligation in September,

1306 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

1915. In case they did not consider it advisable to ship any merchandise at all, they could not be forced to do so under the contract. Also, they were not prevented from making shipments to other European purchasers in the same way as to the Reichseinkauf. In other words, they were at liberty to offer and to deliver merchandise of the character specified in the letter of September 25th, which they shipped to neutral Baltic ports, to third persons. Only if and when they notified the Reichseinkauf
1307 that certain merchandise would be supplied on the basis of its offer of purchase, or that such merchandise had been shipped for the Reichseinkauf, did the sale become perfected between the two parties. It results that prior to such notification the risk of a certain cargo could not, in any event, pass to the plaintiff, for it is unthinkable that the purchaser should bear the risk for a certain thing, before a certain object has been finally determined, which he would be obligated to accept and the seller to deliver.

In view of the foregoing, the risk of the voyage cannot have passed to the plaintiff, with regard to the shipment per the United States and the Hellig Olaf, however
1308 the contract of September 25th may be interpreted. Grossmann & Sielcken had shipped the merchandise to Harry Levin's address in Copenhagen. The latter was their representative, not the representative of the plaintiff even though he may have been suggested to them by the plaintiff as a suitable person. This results quite clearly from Exhibits 7-9 and 4, according to which Levin received the bills-of-lading from the representative of the seller in order to deal therewith according to its advice, and that he turned them over, at its request, to the representative of the plaintiff, Daniel Bruhn. The letter of May 29, 1915 (Exhibit 4), of Mr. Sielcken, deceased, shows also that he considered Levin as his representative. The transmittal of the bills-of-lading to Levin was, therefore, not an offer of the merchandise directed to the plaintiff. On the contrary, such an offer relating to the merchandise on the United States was received by the plaintiff only with the letter dated Hamburg, March 28th

(Exhibit 8). Prior thereto, the plaintiff did not know anything about this shipment. Since the steamer arrived in Copenhagen as early as March 27th, Levin, the Copenhagen representative of the seller (if not its Hamburg representative) was certainly informed on the 28th of the seizure. The first notice of the shipment by the Hellig Olaf, which arrived in Copenhagen on April 17th, was given by the seller to the purchaser by the telegram of April 21st (Exhibit 16), only after Mr. Sielcken, the shipper, had admittedly been informed by Levin of the seizure. Consequently, both shipments were offered by the seller to the purchaser only after the seizure had taken place and was, more-over, known to the European representatives of the purchaser. This was unauthorized. The seller did not have the right to offer to the purchaser, with respect to its binding offer of purchase, merchandise affected by an enemy measure which brought the risk of total loss very close and which, in any event, prevented the purchaser from disposing freely of the merchandise.

The plaintiff would therefore have been entitled to immediately refuse to accept the bills-of-lading and merchandise even though the contract with the defendant of September 25th were interpreted so that the purchaser had to carry the risk of the voyage.

III. Moreover, this interpretation must be considered as unsound.

From the telegram of the Undersecretary of State Richter of September 25th, and from the report of Geheimrat Frisch of September 23, 1915, it would appear very probable that it was the intention and the idea of the Reichseinkauf to contract, not for delivery in the United States but for delivery in a Baltic port. This is not decisive, it is true, because it refers to observations made by persons within the organization of the purchaser. Only if, as contended, Mr. Ballin had communicated the entire contents of the said telegram to Mr. Sielcken would this point be important. Apart from that, the contents of the letter of confirmation alone is decisive, as from its language the circumstances of the case and the character of the whole financial transaction must be understood.

1312 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

The seller, it is true, was a commercial business located in New York, and it accordingly had to fulfill its obligations at that place unless the designation of another place of performance is indicated either from the agreement of the parties or from the circumstances.

However, in consideration of all the circumstances, the court of arbitration has felt constrained to construe the letter of confirmation to the effect that delivery by the seller was to be effected at the port of destination.

1313 The amount of the commission agreed on throws no weight on either side. Possibly, it is true, the Reichseinkauf might have granted the seller a commission of 10%, even in case of delivery at New York, because it meant an advantage to contract with a reliable and solvent house to which all opportunities for an advantageous purchase were open. On the other hand, Crossman & Sielcken could also be very well satisfied with an in-between profit of 10% even in case of delivery at Copenhagen. It must be taken into consideration, in that respect, that the contract was made in the summer of 1914, *i. e.*, at the beginning of the war, and that the risk of transportation was not given much consideration by the seller, all the

1314 more so since it might deem itself sufficiently protected by the war risk insurance, the cost of which was to be refunded. In any event, the Reichseinkauf could not conclude from the rate of commission that the seller wanted to deliver in New York only and that it did not want to bear the risk of the voyage. The amount of the commission, therefore, is immaterial for the decision.

It is also without foundation when the defendants refer to the use of the abbreviation cif in support of their interpretation. When, in the course of the typical shipping business, the price is determined by using the so-called cif-clause, such an abbreviation means that in consideration of the purchase price, which is fixed at a certain sum, the seller is not merely obligated to deliver the merchandise but that, apart from this principal act, he has also to bear the costs of insurance and freight to the port of destination. That may indicate, it is true, that the seller has already fulfilled his obligation of delivery

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at the place of shipment and does not carry the risk of the voyage, for if he had to deliver at the port of destination only it would be a matter of course, and not worth mentioning, that the costs of the voyage to that place fall upon him.

However, in the case under consideration the abbreviation cif is used in an entirely different connection. The sales price is not stipulated at a fixed sum, but shall be calculated by establishing the cost price and adding thereto a profit of 10%. Now the cost price upon which this

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calculation is to be based is the amount representing the value of the merchandise to the seller in Copenhagen (the net price plus freight and cost of insurance to the port of destination). This alone is meant by the term "value of the cargo cif port on Baltic Sea" which, in this connection, means nothing but the value of the cargo *at* the Baltic port. It results that the value of the contractual performance upon which the seller shall earn 10%, is assumed to be the value at the Baltic port. This strongly supports the assumption that delivery at a Baltic port was contemplated as the contractual performance.

It is in complete harmony with the foregoing that the Reichseinkauf was obligated to accept delivery of the

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merchandise at a Baltic port. The acceptance of purchased merchandise, it is true, may also be effected at a place other than the place of performance of the seller. However, when, as in the present case, the obligation of the purchaser is determined to the effect that he shall accept delivery of the merchandise in the port of destination and that he shall pay therefor at such place after its arrival, against the bills-of-lading, a price which corresponds to the cost price at the port of destination plus a profit granted to the seller, a natural interpretation of this agreement leads to the understanding that the seller has to effect the performance which constitutes the basis for the calculation of his remuneration—namely, delivery at the port of destination—and that the place of the acceptance of the merchandise which quite naturally resulted from the stipulation concerning the establishment, was expressly emphasized in the contract because it should

be identical with the place of performance of the seller, which is frequently determined in contracts.

Nothing in the subsequent attitude of the parties speaks against such an interpretation of the letter of confirmation. After the arrival and seizure of the merchandise on board the SS "United States" and "Hellig Olaf" had become known, both parties endeavored to obtain its release. When under these circumstances Mr. Volckens telegraphed to Mr. Boening on April 29th: "Sielcken cer-
1319 tainly gladly willing to do everything possible in *your* interest in order to assist *you,*" it is not even clear that the sender advisedly intended to express thereby that the interests of the plaintiff alone were at stake; even less is it certain that the telegram was so understood by the receiver. Primarily, the language used was without legal significance; it could be passed over and did not call for objections in case it was incorrect. Moreover, the contents of the letter sent by Mr. Sielcken to Levin on May 29th must also be taken into account. He writes that his firm has arranged for all of the merchandise shipped by it to remain in Scandinavia and requests Levin to sell the merchandise in Denmark or in England, promising a
1320 commission of 5%; that he implied that he considered his firm to be the owner of the merchandise, or at least the person carrying the risk. In view thereof, it is non-essential that the plaintiff accepted the bills-of-lading of the United States and the Hellig Olaf and that it even paid for the cargo of the United States although it was informed of the seizure. The court of arbitration is satisfied that the plaintiff acted so exclusively in expectation that it would be able to obtain the release of the merchandise, and that, in the same way as Sielcken, it participated in the endeavors to prevent the threatening damage in the interests of both parties concerned, while it presented its contrary legal conception later on.

In these circumstances, the court of arbitration feels constrained to interpret the contract in dispute in the light of a natural understanding of the letter of confirmation to the effect that the delivery of, as well as the payment for the merchandise to be sold should be made at

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the port of destination, from which it follows that the purchaser has to carry the risk of the voyage.

IV. With regard to the cargo shipped on the steamer Gunborg, the foregoing at once decides the dispute in favor of the plaintiff. This merchandise, which had been shipped from New York on April 12th, was notified to the plaintiff on April 21st by telegram (Exhibit 16). The merchandise became thereby the subject-matter of a sales transaction between the parties. However, it was lost during the voyage and could not be delivered. Consequently the plaintiff is not obligated to pay therefor.

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V. Concerning the shipments per the steamers United States and Hellig Olaf, the same decision must be made in principle. In this respect the argument presented under II has a primary bearing.

These shipments were notified to the defendant for the first time on March 28th and April 21, 1915, respectively, after their arrival in Copenhagen. However, the seller did not have the right to make an offer, on the basis of the binding offer of purchase of the plaintiff of September 25, 1914, of the merchandise which, as was known to its European representative, was encumbered with the British seizure and delivery of which could not be enforced against the ship owners.

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Apart therefrom the interpretation of the contract, as proven under III hereinabove, leads to the conclusion that the seller has to carry the consequences of the seizure. The seller had to make delivery at Copenhagen and therefore had to bear the risk of the voyage. Even though the merchandise arrived physically intact at Copenhagen, it had been affected during the voyage by the seizure. The risk of this happening falls upon the seller. Since, on account of the seizure, the ship owners could not be forced to deliver the merchandise, the seller could not make delivery and accordingly has no right to the price.

VI. With regard to the shipments on the United States and Hellig Olaf, the case would be ready for decision had the plaintiff immediately refused to accept the bills-of-lading. However, it accepted the bills-of-lading with re-

1324 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

spect to both shipments and—as it would appear, particularly in the light of Bruhn's letter of April 20, 1915 (Exhibit 19)—engaged in endeavors to obtain the release of the merchandise, instead of returning the bills-of-lading and expressing in a clear way its attitude declining acceptance. So far neither of the parties has disclosed for what reasons their endeavors remained unsuccessful. The decision of Danish courts, produced by the plaintiff, it is true, show that juridical compulsion could not be
1325 contemplated against the ship owners with any prospect of success. However, it remains unclear whether by the immediate production of a declaration that the merchandise would remain in Denmark (home consumption), as referred to in the letter of April 18th (attached to Exhibit 19), a cancellation of the seizure and a voluntary delivery on the part of the ship owners might have been obtained. In case that had been possible and in case it could be traced to any fault of the plaintiff that the merchandise was not delivered but was transported to England, the plaintiff would have to carry the consequences of the loss.

Therefore, further elucidation of this point has been
1326 requested.

The co-arbitrator, Dr. Kiesselbach, is requested to attend to the service and deposition of this arbitral decision.

Sgd. DR. F. PHILIPPI.
Sgd. DR. REIMER.
Sgd. DR. KIESSELBACH.

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Anlage D

Herrn Dr. Israel

23. Juli 1918.

Sehr geehrter Herr Dr. Kaemmerer!

Einschreiben.

Auf Ihr gefl. Schreiben vom 17.d. Mts. i.Sa.Z.E.G. gegen Hermann S i e l c k e n Nachlass gestatte ich mir zu erwidern: 1328

Ich habe alsbald nach Zustellung des Schiedsspruches an unsere dänische Vertretung mit der Bitte um weitere Mitteilung über den einsigen noch in Frage kommenden Punkt geschrieben; ich bin noch ohne Antwort und übersende Ihnen zu treuen Händen mit der Bitte, den Inhalt der Anlagen als vertraulich zu behandeln abgesehen selbverständlicherweise von Ihrer Befugnis, die den Streitfall betreffenden Tatsachen als vertrauliche an Ihre Klienten weiterzugeben.

1) Brief des Herrn Bruhn an meinen Kollegen Herrn Rehbein vom 29, März 1915, 1329

2) Brief des Herrn Huldermann an Herrn Geheimrat Frisch vom 7. Juni 1915,

Ich bitte um Rücksendung der Anlagen nach genommener Einsicht.

3) Brief des Herrn Bruhn an Herrn Dr. Crasemann, der zur tatsächlichen Aufklärung des Sachverhalts nach Dänemark entsandt war, vom 2.April 1918.

Nach den Anlagen spricht die Wahrscheinlichkeit dafür, dass die Reederei tatsächlich nicht bereit war, gegen Heimkonsumerklärung die Ladung der "United States" auszuliefern, aber immerhin mögen bei dem Dampfer "United States" Zweifel nach der Richtung

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vorliegen, ob, wern sofort eine Heimkonsumerklärung abgegeben worden wäre, die Auslieferung erfolgt wäre.

Bei den übrigen streitigen Dampfern, nämlich "Arkansas" und "Hellig Olaf," die am 17. April in Kopenhagen eingetroffen sind und "Oskar II.", der am 11. Mai in Kopenhagen eintraf, bestehen solche Zweifel nicht. Bei dieser Sachlage ist die Zentral-Einkaufsgesellschaft bereit, die Angelegenheit dahin zu vergleichen, dass
1331 Crossmann & Sielcken den bezahlten Kaufpreis für die Ladung der "United States" behalten, während sie ihre Forderung auf Bezahlung bezw. Vergütung der übrigen sechs Dampferladungen fallen lassen.

Die Firma Crossmann & Sielcken muss sich verpflichten, das, was, ihr etwa später von irgend einer Seite (der englischen Regierung, Assekuranz usw.) für diese Dampferladung bezahlt wird, der Z. E. G. zukommen zu lassen, und müsse sich bereit erklären, sofern dann etwa nach Friedensschluss die Möglichkeit besteht, dass die Z.E.G. selbst den Anspruch auf Ersatz dieses Schadens oder eines Teils gegen Dritte, z.B. die englische
1332 Regierung geltend machen kann, die Z.E.G. hierin nach besten Kräften zu unterstützen.

Wenn dieser Vergleich zustanden kommt, würde die Zentral-Einkaufsgesellschaft bei dem Objekt von ungefahr 418.000 Dollar mit etwa 31.000 Dollar unterlegen sein, im übrigen obgesiegt haben, d.h. sie würde mit mehr als 12/13 obgesiegt haben und mit 1/13 ünterlegen sein.

Ich schlage daher vor, dass die Zentral-Einkaufsgesellschaft von den Kosten des Schiedsgerichts 1/13 trägt, während 12/13 dem beklagtischen Nachlass zur Last fallen.

Ich bin damit einverstanden, dass die aussergerichtlichen Kosten gegeneinander aufgehoben werden, weil die Z.E.G. keine eingentlichen Anwaltskosten, sondern nur Dr. Crasemanns und meine Reiseikosten gehabt hat.

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An diesen Vergleichsvorschlag hält sich die Z.E.G. bis zum 30.d.Mts. gebunden. Ich nehme an, dass vor diesem Zeitpunkt die aus Dänemark angeforderten Informationen eingetroffen sein werden und werde, wenn innerhalb der gesetzen Frist der Vergleich nicht zustande kommt, einen Vergleich auf die ser Grundlage nur dann schliessen, wenn ich mich auf Grund der dänischen Mitteilungen davon überzeuge, dass keine erhebliche Aussicht auf Durchsetzung des diesseitigen Standpunkts im Falle des Dampfers "United States" vorhanden ist. 1334

Zentral-Einkaufsgesellschaft
mit beschränkter Haftung

Ihr sehr ergebener
gez.: Dr. G. Melchior.

Die Richtigkeit der vorstehenden Abschrift wird beglaubigt.

Berlin, den 16. Januar 1928.

(Illegible)
Assessor 1335

(Seal)

(Translation)

Dr. Israel July 23, 1918.

Dear Dr. Kaemmerer: Registered.

In reply to your letter of the 17th inst., in the matter of Z.E.G. vs. Hermann S i e l c k e n Estate, I beg to state:

Immediately upon receipt of the arbitral decision I wrote to our Danish agency asking for further information on the one outstanding point; I am still without reply, and I transmit herewith, in trust, the documents

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listed below with the request that their contents be considered as confidential. Of course, you have the right to forward to your clients, confidentially, the facts concerning the dispute.

1) Letter of Mr. Bruhn to my colleague Mr. Rehbein, of March 29, 1915,

Kindly return the enclosures after you have noted same

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2) Letter of Mr. Huldermann to Geheimrat Frisch, of June 7, 1915,

3) Letter of Mr. Bruhn to Dr. Crasemann, dated April 2, 1918, which letter was sent to Denmark for clearing up the facts.

According to the enclosures it appears likely that the ship owners were actually not willing to release the shipment of the "United States" against a "declaration of home consumption," but nevertheless there might exist doubts concerning the steamer "United States," whether —in case a "declaration of home consumption" had been
1338 made immediately—the delivery would have been executed.

Such doubts do not exist with regard to the remaining steamers under dispute, i.e. "Arkansas" and "Hellig Olaf," which arrived in Copenhagen on April 17th, and "Oscar II, "which arrived in Copenhagen on May 11th. In this situation the Zentral-Einkaufsgesellschaft if willing to settle the matter in such a way that Crossmann & Sielcken retain the purchase price paid for the shipment of the "United States" while they relinquish their claim for payment and/or compensation for the remaining six shipments.

The firm of Crossman & Sielcken shall assume the obligation to transfer to the Z.E.G. any amount which it might receive for these shipments from any quarter (the English Government, insurance company, etc.), and must declare itself willing to assist the Z.E.G. to

the best of its ability in the event that after the conclusion of peace there exists the possibility that the Z.E.G. may claim indemnity for the loss, or part thereof against third persons, for instance, the English Government.

In case this agreement is consummated, the Zentral-Einkaufsgesellschaft will be defeated to the extent of $31,000 on an amount of about $418,000 and will have won as to the balance, i.e. it will have won more than 12/13 and be defeated with 1/13. 1340

I propose therefore, that the Zentral-Einkaufsgesellschaft bear 1/13 of the expense of the arbitration while 12/13 be borne by the defendant estate.

I agree that each party shall bear the extra judicial costs because the Z.E.G. has not had any actual attorney fees but only the traveling expenses of Dr. Crasemann and myself.

The Z.E.G. will hold itself bound by this proposal for settlement until the 30th of this month. I assume that the information requested from Denmark will have arrived by that time and, should the settlement not be 1341
arrived at within the time limit fixed, I will settle the matter on this basis only if I am convinced by the Danish information that there does not exist a great possibility for carrying our point of view in regard to the steamer "United States."

Zentral-Einkaufsgesellschaft
mit beschraenkter Haftung

Yours very truly,

(sgd.) DR. G. MELCHIOR.

The correctness of the above copy is certified.

Berlin, January 16, 1928. (Sgd) Signature
(Seal) Assessor.

1342 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

Anlage E

Dres. BEHN KAEMMERER BAUR
Rechtsanwälte

Hamburg 11, den 25. Juli 1918.
Alterwall 20 II.

Dr. Max C. A. Predöhl
Rechtsanwalt
1343 Zentral Einkaufs-Gesellschaft m.b.H.,
Vorstand,
z.H. des Herrn Dr. G. Melchior.

Berlin W.8.
Behrenstr. 21.

Sehr geehrter Herr Doktor!

Ich erhielt Ihr gefl. Schreiben mit Anlagen und Vergleichsvorschlag in Sachen Z.E.G.;Hermann Sielcken Nachlass. Ich kann die Sache, da der Mitvollstrecker
1344 Herr Georgius von der Firma Th. Wille, der die Angelegenheit in erster Linie behandelt hat, augenblicklich verreist ist, wahrscheinlich erst übermorgen mit meinen Auftraggebern näher beraten und da Sie sich nur bis zum 30. ds. an Ihren Vorschlag gebunden halten, erlaube ich mir zu diesem Vorschlag, insoweit er die Kosten betrifft, zu bemerken, dass die von Ihnen vorgeschlagene Verteilung meiner Ansicht nach doch nicht der Billigkeit entspricht. Den Streitgegenstand bilden doch, wie Sie in der Klagschrift und späteren Ergänzung derselben ausdrücklich ziffermässig festgelegt haben, die Ladungen per D. "Gunborg," "Hellig Olav" und "United States." Nach dem Wert dieser Sendungen wird sich das Schiedsgericht seine Kosten berechnen und so muss doch auch für die Teilung der Kosten unter uns auf Grund des Vergleichs von derselben Grundlage ausgegangen werden. Wollen Sie nicht den kleinen Schritt uns noch weiter entgegenkommen und sich bereit erk-

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lären, dass die Kosten wenigstens so geteilt werden, dass meine Partei 3/4 und die Z.E.G. 1/4 der Kosten des Schiedsgerichts übernimmt? Die Teilung im Verhältnis von 12/13 zu 1/13 macht für meine Partei einen zuschlechten Eindruck und fürchte ich, dass die Herren daran grossen Anstoss nehmen werden.

Zu Absatz 3 auf Seite 2 Ihres Schreibens bemerke ich, dass m. E. ein Schreibfehler insofern vorliegt, als es in Zeile 3 heissen muss "für diese Dampferladung" statt "für diese Dampfer ladungen." Die fragl. Verpflich-

1346

tung kann doch die Frima Crossmann & Sielcken bezw. Hermann Sielcken Nachlass nur für die Ladung per D. "United States" übernehmen, während sie für die übrigen Ladungen, die sie nicht bezahlt erhält, nur selbst Interessentin ist.

Was die Firma Crossmann & Sielcken anbetrifft, so wird dieselbe in Nord-Amerika zwangsweise liquidiert; vielleicht ist die Liquidation schon beendet, wir wissen nichts darüber. Eine Verpflichtung für diese Firma lässt sich also wohl nur in dem Sinne übernehmen, dass seitens der Testamentsvollstrecker des verstorbenen Herrn Hermann Sielcken evt. in dem gewünschten Sinne auf

1347

die Liqidatoren oder sonstige Vertreter der Firma, wenn solche vorhanden sind, eingewirkt wird; daneben könnte aber von Hermann Sielcken Nachlass allen Umfangs die von Ihnen gewünschte Verpflichtung übernommen werden, die ja an sich selbs tverständlich und in Ordnung ist.

Wenn Sie sich die Mühe machen wollen, auf Vorstehendes umgehend noch kurz mit einigen Zeilen zu antworten, würde ich Ihnen zu Dank verpflichtet sein,

Hochachtungsvoll

Dres. BEHN KAEMMERER BAUR
gez. Kaemmerer.

Die Richtigkeit der vorstehenden Abscrift wird beglaubigt.

Berlin, den 16. Januar 1928.

Signature
Assessor.

(Seal)

1348 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

Translation.

Drs. BEHN KAEMMERER BAUR
Attorneys at Law

Dr. Max C. A. Predoehl
Attorneys at Law.

Hamburg 11, July 25, 1918
Alterwall 20 II.

1349 Zentral Einkaufs-Gesellschaft m.b.H.,
Board of Directors,
c/o Dr. G. Melchior,

Berlin W. 8.
Behrnstr. 21.

Dear Doctor:

I am in receipt of your letter, with enclosures and proposition for settlement in the matter of the Z.E.G. vs. Hermann Sielcken Estate. Inasmuch as the co-
1350 executor Mr. Georgius, of the firm Th. Wille, who is primarily in charge of this matter, is at present on a trip, I probably shall not be able to discuss this subject with my principals until day after tomorrow. Since you consider your proposal as binding until the 30th of this month only, I beg to remark as to this proposal that, so far as the costs are concerned, the proposed distribution is, in my opinion, not fair. The matter in dispute, as you expressly set out in figures in the writ of complaint and in a later supplement thereof, involves the shipments of the steamers "Gunborg," "Hellig Olav," and "United States." The court of arbitration will calculate its costs according to the value of these shipments and the distribution of the costs among ourselves should be calculated on the same basis, in view of this settlement. Will you not come a little step further to meet us and declare yourself willing that the costs be so distributed that my party shall as-

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sume 3/4 and the Z.E.G. 1/4 of the expense of arbitration? The distribution in the proportion of 12/13 to 1/13 makes too unpleasant an impression on my party and I am afraid the gentlemen will take offense at it.

As to paragraph 3 on page 2 of your letter, I remark that in my opinion there must be an error in writing inasmuch as it should read in the third line "for this steamer shipment" instead of "for these steamer shipments." The firm of Crossman & Sielcken and/or Hermann Sielcken Estate can assume the obligation in question only for the shipment of the steamer "United States" while for the remaining shipments, for which it does not receive payment, it is only self-interested. 1352

With regard to the firm of Crossman & Sielcken, this firm is under compulsory liquidation in North America; perhaps the liquidation has already been terminated—we know nothing about it. An obligation on behalf of this firm can therefore be assumed only in this way, that the executors of Mr. Hermann Sielcken, deceased, exercise an influence in the above sense on the liquidators or other representatives of the firm—if there should be any besides this, the estate of Hermann Sielcken might assume the desired obligation to the full extent which is in itself a matter of course and quite proper. 1353

I shall be very much obliged if you will kindly take the trouble to reply briefly to the aforesaid.

Respectfully,

DRS. BEHN KAEMMERER BAUR

Sgd. KAEMMERER.

The correctness of the above copy is certified.

Berlin, January 16, 1928. (Seal) Signature

Assessor.

1354 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

Anlage F

Einschreiben 26. Juli 1928.

Dr. G. M. Ste.

Herrn Rechtsanwalt Dr. Kaemmerer,

Hamburg
Alterwall 20 II.

1355 Sehr geehrter Herr Dr. Kaemmerer,

In Sachen Z.E.G. gegen Hermann Sielcken Nachlass bestätige ich den Empfang Ihres gefälligen Schreibens vom 25.ds.Mts.

Ich übersende Ihnen zunächst zu treuen Händen mit der Bitte um Rücksendung einen Bericht des Herrn Bruhn vom 20.ds.Mts. nebst zwei Anlagen. Ich verkenne nicht, dass der Bericht nicht eine genügende Klarheit schafft, und dass, wenn das Schiedsgerichtsverfahren fortgesetzt werden soll, die Erkundigungen ergänzt werden müssen.

In der Frage der Verteilung der Schiedsgerichtskosten bin ich mit Ihrem Vorschlage einverstanden.

1356 Ich bestätige, dass der von Ihnen erwähnte Schreibfehler in Absatz 3 auf Seite 2 meines Schreibens vom 23. Juli in der von Ihnen angegebenen Weise richtiggestellt werden muss.

Mit der Beschränkung der Verpflichtung des Sielcken'schen Nachlasses bezüglich der Ladung der "United States" im Sinne des vorletzten Absatzes Ihres gefälligen gestrigen Schreibens bin ich einverstanden. Aber da ich aus Ihren Ausführungen ersehe, dass Sie namens der Firma Crossman & Sielcken keine Erklärungen abgeben können, somuss in dem Vergleich festgelegt werden, dass der Sielcken'sche Nachlass der Z.E.G. dafür verantwortlich ist, dass dem Vergleich von der Firma Crossman & Sielcken und deren Rechtsnachfolgern im übrigen nicht zuwidergehandelt wird, insbesondere ist also der Sielcken'sche Nachlass im Falle des Zustandekommens des Vergleichs cerpflichtet, die Z.E.G. von den Forderungen

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1357

freizuhalten, welche etwa auf Vergütung der sechs nach dem Vergleich von der Z.E.G. nich zu bezahlenden Dampferladungen von der Firma Crossman & Sielcken oder deren Rechtsnachfolgern oder Vertretern erhoben werden sollten.

Ich bitte höflichst um Mitteilung Ihrer Stellungnahme. Da ich in den nächsten Tagen weiteren Bericht aus Dänemark nicht zu erwarten habe, verlängere ich die Frist bis zur annahme dieses Vergleichs bis zum 1. August d.J. 1358

Ihr sehr ergebener
gez. DR. G. MELCHIOR

Die Richtigkeit der vorstehenden Abschriftwird beglaubigt.

Berlin, den 16. Januar 1928 Signature
Assessor.

(Seal)

1359

Translation.

REGISTERED

July 26, 1928

Dr. G-M Ste.

Dr. Kaemmerer, Attorney,

Hamburg
Alterwall 20 II.

Dear Dr. Kaemmerer:

I confirm receipt of your letter of the 25th inst. concerning the matter of the Z.E.G. vs. Hermann Sielcken Estate.

In the first place, I transmit herewith, in trust, a report of Mr. Bruhn, dated the 20th inst., with two enclo-

1360 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

sures, and request that same be returned. I am not mistaken that the report fails to clear up the situation sufficiently and that, in case the arbitration proceedings shall be continued, the information must be supplemented.

As to the question of the distribution of the arbitration costs, I agree with your proposal.

I confirm that the error in writing in paragraph 3 on page 2 of my letter of July 23rd must be rectified in the manner suggested by you.

1361 I agree to the limitation of the obligation of the Sielcken Estate concerning the cargo of the "United States," as set forth in the second last paragraph of your yesterday's letter. Inasmuch as I learn from your communication that you are unable to make declarations on behalf of the firm of Crossman & Sielcken, it should be established in the settlement that the Sielcken Estate is responsible to the Z.E.G. that the firm of Crossman & Sielcken and its legal successors do not act contrary to the settlement; especially, the Sielcken Estate is obligated, in case the settlement shall be concluded, to save the Z.E.G. harmless from any claims which may be made by the firm of Crossman & Sielcken or its legal successors or
1362 representatives for compensation for the six shipments which, according to the settlement, the Z.E.G. is not obligated to pay for.

I ask you kindly to communicate your opinion in this matter.

Since I am not expecting further information from Denmark, I prolong the time limit for the acceptance of this settlement until the first of August of this year.

Yours sincerely,

(Sgd) DR. G. MELCHIOR

The correctness of the above copy is certified.

Berlin, January 16, 1928.

(Sgd) Signature
Assessor.

(Seal)

Exhibit B Annexed to Answering Affidavit of Braindrd Avery 1363

(Exhibit h)

Dres. Behn Kaemmerer Baur
Rechtsanwaelte

Dr. Max G. A. Predoehl
Rechtsanwalt

Hamburg 11, Den 31. Juli 1918
Alterwall 20 II.

Einschreiben. 1364

Zentral-Einkaufsgesellschaft m.b.H:
z.H.d. Herrn Dr. G. Melchior,

Berlin W 8
Behrenstrasse 21.

Sehr geehrter Herr Doktor:

In Schiedsgerichtssachen Hermann Sielcken Nachlass bestaetige ich Ihnen meine heutiges Telegramm, nach welchem ich Ihren Vergleichsvorschlag, wie er sich aus Ihren Briefen vom 23. und 26. ds. Mts. ergibt, angenommen habe. Danach wird seitens meiner Partei der Anspruch auf Bezahlung der sechs Dampferladungen, mit 1365
Ausnahme der Ladung per D. "United States," fallen gelassen, waehrend die Z.E.G. die Ladung per D. "United States" zu bezahlen hat, bezw. meine Partei den bezahlten Kaufpreis behaelt. Von den Kosten des Schiedsgerichts traegt Hermann Sielcken Nachless 3/4 und die Z.E.G. 1/4; dis aussergerichtlichen Kosten werden gegeneinander aufgehoben. Die Firma Crossman & Sielcken bleibt verpflichtet, der Z.E.G. zukommen zu lassen, was ihr etma fuer die Ladung der "United States" zugekommen sein sollte oder in Zukunft zukommen sollte. Sie hat auch die Z.E.G., wenn diese selbst den Anspruch auf Erlass des Schadens oder eines Teils desselben gegen Dritte, z.B. gegen die englische Regierung geltend machen will, hierin nach besten Kraeften zu unterstuetzen. Fuer die Firma Crossmann & Sielcken kann jedoch diese Verpflichtung seitens Hermann Sielcken Nachlass nur in dem Sinne uebernommen werden, dass in dem genannten Sinne seitens der Testamentsvollstrecker des verstorbenen Hermann

1366 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

Sielcken auf die Liquidatoren oder sonstige Vertreter der Firma, wenn solche vorhanden sind, eingewirkt wird. Ausserdem ist Hermann Sielcken Nachlass, vertreten durch die Testamentsvollstrecker, der Z.E.G. dafuer verantwortlich, dass von der Firma Crossmann & Sielcken bezw. deren Rechtsnachfolgern dem Vergleich im uebrigen nicht zuwider gehandelt wird, insbesondere hat demgemaess der Hermann Sielcken'sche Nachlass die Z.E.G. von etwaigen Forderungen freizuhalten, die auf
1367 Verguetung der sechs nach dem Vergleich van der Z.E.G. nicht zu bezahlenden Dampferladungen von der Firma Crossmann & Sielcken bezw. deren Rechtsnachfolgern oder vertretern spaeter erhoben werden sollten.

Ich glaube, dass mit vorstehendem alles gesagt ist. Soll nun ueber den Vergleich ein besonderes, von beiden Parteien unterschriebenes Schriftstueck ausgefertigt werden, oder ist das nicht erforderlich? Diesseits wird kein Wert darauf gelegt. Wuenschen Sie ein solches Dokument, so bitte ich zugleich um Mitteilung, ob Sie damit einverstanden sind, dass fuer den Hermann Sielcken'schen Nachlass der Testamentsvollstrecker Herr Gustav Diederichsen, Seniorchef der Firma Theodor Wille, allein zeich-
1368 net; die anderen drei Herren, Herr G. Georgius, Mitinhaber der Firma Theodor Wille, und die beiden Herren Isenberg, Brueder von Frau Sielcken, sind z.Zt. nicht leicht zu erreichen. Ich denke, die Unterschrift von Herrn Gustav Diederichsen wird Ihnen genuegen.

An den Vorsitzenden des Schiedsgerichts koennen wir wohl kurz gemaess Anlage schreiben und bitte ich Sie, wenn Sie einverstanden sind, diese Anzeige zu unterzeichnen und an ihre Adresse zu expedieren.

Saemtliche Anlagen zu Ihren Briefen vom 23. und 26. ds. fuege ich mit bestem Dank wieder bei.

Hochachtungsvoll

Ihr sehr ergebener
gez. Kaemmerer.

Die Richtigkeit der vorstehanden Abschrift wird beglaubigt.

Berlin, den 16. Januar 1928. Signature
Seal Assessor.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1369

Translation

2/58 G

Dres. Behn Kammerer Baur
Attorneys at Law

Dr. Max G. A. Predoehl
Attorney at Law.

Hamburg 11, July 31, 1918. 1370
Alterwall 20 II.

REGISTERED.

Zentral-Einkaufsgesellschaft m.b.H.
c/o Dr. G. Melchior,

Berlin W 8
Behrenstrasse 21.

Dear Doctor:

In the arbitration matter of the Hermann Sielcken Estate, I beg to confirm my telegram of today, according to which I have accepted your offer of compromise as it 1371 is set out in your letters of the 23rd and 26th of this month. Consequently my party relinquishes the claim for the payment for the six shipments, with the exception of the shipment per SS "United States," while the Z.E.G. has to pay for the shipment per SS "United States," and my party keeps the sales price which has been paid. The costs of the arbitration are to be borne by the Hermann Sielcken Estate in the ratio of 3/4 and by the Z.E.G. in the ratio of 1/4. Each party shall bear its own extra judicial costs. The firm of Crossmann & Sielcken remains obligated to turn over to the Z.E.G. whatever it may have received or may receive in future for the shipment per the "United States." It also undertakes to assist the Z.E.G. to the best of its ability in case the Z.E.G. shall decide to make claim for compensation for the damage or a part thereof against third persons, for instance, against the British Govern-

1372 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

ment. This obligation, however, can be assumed by the Hermann Sielcken Estate on behalf of the firm of Crossmann & Sielcken only in the sense that the executors of Hermann Sielcken, deceased, shall bring influence to bear in this direction upon the liquidators or other representatives of the firm, if there be any. In addition, the Hermann Sielcken Estate, represented by the executors, is responsible to the Z.E.G. that the firm of Crossmann & Sielcken and/or its legal successors shall not,
1373 in other respects, act contrary to the settlement. In particular, the Hermann Sielcken Estate shall save harmless the Z.E.G. from any claims which may later on be made by the firm of Crossman & Sielcken and/or its legal successors or representatives for the shipments which shall not be paid.

I believe that the foregoing covers the whole ground.

Must the compromise be executed in a separate document signed by both parties, or is that not necessary? On our side, we do not place any weight on this detail. In case you desire such a document, please advise at the same time whether you agree that the executor Mr. Gustav Diederichsen, Senior Member of the firm of Theo-
1374 dor Wille, may sign alone on behalf of Hermann Sielcken Estate. At the present time it is not easy to get hold of the three other gentlemen: Mr. G. Georgius, co-partner of the firm of Theodor Wille, and the two Messrs. Isenberg, brothers of Mrs. Sielcken. I think you will consider the signature of Mr. Gustav Diederichsen sufficient.

I suggest that we send a short notice to the chairman of the court of arbitration, as per enclosure, and in the event that you agree, I would ask that you sign this communication and mail it to its address.

All the enclosures sent with your letters of the 23rd and 26th inst, are returned with my best thanks.

Respectfully yours,

Sgd. KAEMMERER.

The correctness of the above copy is certified.

Berlin, January 16, 1928. Seal Signature. Assessor.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1375

(Exhibit i.)

Dr. G. M. Ste. 1. August 1918.

Herrn Rechtsanwalt Dr. Kaemmerer,

Hamburg
Alterwall 20 II.

Sehr geehrter Herr Dr. Kaemmerer:

In Sachen Crossmann & Sielcken bestaetige ich den 1376
Empfang Ihrer gefaelligen gestrigen Depesche laut Anlage und Ihres gestrigen Schreibens nebst Anlagen. Mit dem Inhalt Ihres Schreibens bin ich einverstanden.

Es wuerde mir erwuenscht sein, eine Bestaetigung des Zustandskommens des Vergleichs auch von Sielcken Nachlass zu erhalten, weil ich nicht weiss, ob spaetere Liquidatoren der Zentral-Einkaufsgesellschaft mit einer lediglich von Ihnen stammenden Erklaerung—die mir vollstaendig genuegen wuerde—zufrieden sein werden. Aber dann wuerde wohl eine Unterschrift durch soviel Testamentsvollstrecker noetig sein wie zur Vollstreckung des Nachlasses erforderlich sind. Ich gestatte mir, auf Par. 179 1377
Absatz 3 1 B.G.B. zu verweisen.

Ich bitte Sie also, mir gelegentlich eine dem Inhalt Ihres gefaelligen gestrigen schreibens entsprechende Erklaerung des Nachlasses zukommen zu lassen. Sie werden dann eine Zustimmungserklaerung der Zentral-Einkaufsgesellschaft erhalten. Der Vergleich ist selbstverstaendlicherweise schon jetzt endgueltig zustande gekommen.

Die von Ihnen entworfene Mitteilung an den Vorsitzenden des Schiedsgerichts wird mit der Unterschrift der Z.E.G. an ihn eingesandt.

Ihr sehr ergebener
gez. Dr. G. Melchior.

Die Richtigkeit der vorstehenden Abschrift wird beglaubigt.

Berlin, den 16. Januar 1928. Seal. Signature. Assessor.

1378 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

Translation

2/61 H

August 1, 1918.

Dr. G. M. Ste.
Dr. Kaemmerer, Attorney at Law,

Hamburg
Alterwall 20 II.

1379 Dear Dr. Kaemmerer:

In the matter of Crossmann & Sielcken, I confirm receipt of your telegram of yesterday as per enclosure, and of your letter of yesterday with enclosures. I agree with the contents of your letter.

I would like to receive a confirmation of the consummation of the compromise from the Sielcken Estate also, for the reason that I do not know whether, at a later date, the liquidators of the Zentral-Einkaufsgesellschaft will be satisfied with a declaration signed by you alone—which would be perfectly satisfactory as far as I am concerned. However, in that case the signature of as many executors would be necessary as are required for the representation of the Estate. I beg to refer to Sec. 179, Par. 31 of the Civil Code.

1380

I also request you to send me in due course a declaration of the Estate along the lines suggested in your favor of yesterday. You will then receive a declaration of assent by the Zentral-Einkaufsgesellschaft. As a matter of course, the compromise is final and binding even now.

The notification to the chairman of the court of arbitration, as drafted by you, will be sent to him with the signature of the Z.E.G.

Very truly yours,

Sgd. Dr. G. Melchior.

The correctness of the above copy is certified.

Berlin, January 16, 1928 Seal Signature
Assessor.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1381

Exhibit k)

Dres. Behn Kaemmerer Baur
Rechtsanwaelte
Dr. Max G. A. Predoehl
Rechtsanwalt.

Hamburg 11, den 5.Sept.1918.
Alterwall 20 II.
044194 6.Sept.18. 1382

Zentral-Einkaufsges. m.b.H.
Zentralabteilung,

Berlin W 8
Behrenstrasse 21.

Betr: Crossmann & Sielcken/Hermann Sielcken Nachlass.

In der durch Vergleich erledigten Sache beehre ich mich, Ihnen einliegend den von den vier Testamentsvollstreckern des verstorbenen Herrn Hermann Sielcken in vereinbarter Form gezeichneten Revers zu uebermitteln. Damit ist diese Angelegenheit als erledigt zu betrachten. 1383

Zugleich erwidere ich auf Ihre gefl. Zuschrift vom 31. August im Anschluss an Ihr Schreiben vom 16. August, dass ich noch nicht wieder hergestellt bin und mich z.Zt. noch in der Klinik befinde. Ich habe die Angelegenheit deshalb noch nicht mit den Testamentsvollstreckern, und zwar mit den Herren der Firma Theodor Wille, naeher besprechen koennen. Dies wird voraussichtlich auch erst in einigen Wochen moeglich sein. Ich glaube, Sie werden sich meiner Ansicht anschliessen, dass die Angelegenheit doch durchaus nicht eilig ist und auch auf keinen Fall in aller naechster Zeit wird erledigt werden koennen, sodass die kurze Verzoegerung jedenfalls die Interessen der Z.

1384 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

E. G. nicht beeintraechtigt. Ich werde sobald als moeglich auf die Angelegenheit zurueckkommen.

Hochachtungsvoll

Dres. Behn Kaemmerer Baur
gez. Kaemmerer.

E.
Rechtsabteilung
1. Anl.
1385 Expedition. Op.

Die Richtigkeit der vorstehenden Abschrift wird beglaubigt.

Berlin, den 16. Januar 1928.
Seal. signature. Assessor.

Translation

2/63 I

1386 Dres. Behn Kaemmerer Baur
Attorneys at Law
Dr. Max G. A. Predoehl
Attorney at Law

Hamburg 11, Sept. 5, 1918.
Alterwall 20 II.
044194 Sept. 6, 1918.

Zentral-Einkaufsges. m.b.H.
Central Department,

Berlin W 8
Behrenstrasse 21.

Re: Crossmann & Sielcken/Hermann Sielcken Estate.

In the above matter, which has been disposed of by compromise, I have the honor to transmit herewith a declaration, signed in the form agreed on by the four executors of Mr. Hermann Sielcken, deceased. The matter is now to be considered as finally settled.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1387

At the same time I reply to your favor of August 31st, referring to your letter of August 16th, that I have not yet recovered and am still confined to the hospital. For this reason I have not been able to discuss the subject in detail with the executors and with the gentlemen of the firm of Theodor Wille. This will probably only be possible after some weeks. I believe you will concur in my opinion that the matter is not at all urgent and that in no event can it be disposed of in the near future, so that the short delay will not be prejudicial to the interests of the Z. E. G. I will revert to the matter as soon as possible. 1388

Respectfully yours,

Dres. Behn Kaemmerer Baur
Sgd. Kaemmerer

E.
Law Department.
1 Encl.
Forwarding Department Op.

The correctness of the above copy is certified. 1389

Berlin, January 16, 1928.

Seal. Signature. Assessor.

(Exhibit 1.)

An die

Zentral-Einkaufsgesellschaft m.b.H., Vorstand,

Berlin W. 8.
Berehnstr. 21.

Nachdem in der zwischen Ihnen und uns als Testamentsvoll-streckern des verstorbenen Herrn Hermann Sielcken vor dem Schiedsgericht, bestehend aus dem Senatspräsi-

1390 *Exhibit B Annexed to Answering Affidavit of Brainard Auery*

denten Herrn Dr. F. Philippi und den Rechtsanwälten Herrn Justizrat Dr. Reimer und Herrn Dr. Kiesselbach, behandelten Angelegenheit durch den uns vertretenden Rechtsanwalt Dr. A. Kaemmerer ein Vergleich geschlossen ist und durch denselben die zwischen uns wegen der Abladungen der Firma Crossmann & Sielcken von New York nach Kopenhagen aus dem Jahre 1915 entstandenen Differenzen erledigt sind, bestätigen wir Ihnen, dass wir in unserer oben genannten Eigenschaft Ihnen dafür auf-
1391 kommen, dass von der Firma Crossman & Sielcken bezw, deren Liquidatoren oder Rechtsnachfolgern der geschlossene Vergleich anerkannt wird. Insbesondere werden wir Sie von etwaigen Forderungen freihalten, die auf Vergütung dersechs nach dem Vergleich von Ihnen nicht zu bezahlenden Dampferladungen von der Firma Crossman & Sielcken bezw. deren Rechtsnachfolgern oder Vertretern etwa später noch gegen Sie erhoben werden sollten. Ferner werden wir nach Möglichkeit bei den Liquidatoren oder sonstigen Vertretern der Firma Crossman & Sielcken, falls solche vorhanden sein werden, dahin wirken, dass sie Ihnen alles zukommen lassen, was sie etwa von anderer Seite für die Ladung der "United States" erhalten
1392 haben sollten oder erhalten werden, sowie dass sie Sie, wenn Sie selbst einen Anspruch auf Ersatz des Schadens oder eines Teils desselben gegen Dritte, z. B. gegen die englishe Regierung, geltend machen wollen, nach besten Kräften unterstützen.

Hamburg, den 31. August 1918.

gez.: G. Diederichsen — gez.: A. C. Isenberg.
gez.: G. Georgius — gez.: R. M. Isenberg.

Exhibit B Annexed to Answering Affidavit of Brainard Avery 1393

TRANSLATION

2/65 K

To the

Zentral Einkaufsgesellschaft m.b.H., Board of Directors,

Berlin W. 8
Berehnstr. 21.

1394

We refer to the matter handled between you and ourselves in the capacity of executors of Hermann Sielcken, deceased, before the court of arbitration, composed of Dr. F. Philippi, President of the Senate, and the attorneys at law Justizrat Dr. Reimer and Dr. Kesselbach. We refer also to the compromise concluded in the said matter by our representative, Dr. A. Kaemmerer, whereby the dispute arisen between us with regard to the shipments of the firm of Crossmann & Sielcken from New York to Copenhagen in the year 1915, has been settled. We confirm that, in our above capacity, we assume the responsibility that the firm of Crossman & Sielcken and/or 1395
its liquidators or successors will recognize the compromise concluded between us. In particular, we undertake to save you harmless against any possible claims which may later on be made by the firm of Crossmann & Sielcken and/or its successors or representatives for payment for the shipments which you are not obligated to pay for under the compromise. Furthermore, we will endeavor, as far as possible, to induce the liquidators or other representatives of the firm of Crossman & Sielcken, if there should be any, to turn over to you whatever they may have received or may receive from any other source for the cargo of the "United States." We will also endeavor to induce the said persons to assist you to the best of their ability in case you should desire to make claim for compensation for the damage or a part thereof

1396 *Exhibit B Annexed to Answering Affidavit of Brainard Avery*

against third persons, for instance, against the British Government.

Hamburg, August 31, 1918.

Sgd.: G. Diederichsen Sgd.: A. C. Isenberg.
Sgd.: G. Georgius Sgd.: R. M. Isenberg

The correctness of the above copy is certified.

Berlin, January 16, 1928

1397

(Seal)

(Sgd.) Signature
Assessor.

1398

Exhibit C Annexed to Answering Affidavit of Brainard Avery. 1399

Opinion

in the matter of the Estate of Hermann Sielcken, deceased.

I.

Hermann Sielcken, who deceased October 8, 1917, was a citizen of the United States of America, and at the time of his death resided in Baden-Baden. He and his wife 1400
Clara, nee Isenberg, on February 18, 1917, made a joint mutual last will and testament, which—apart from certain new stipulations and alterations—left their New York wills of March 23rd, 1914, in full force and effect, but above all had for its object the bringing into line and agreement with German law of the provisions made in favor of Mrs. Sielcken's two children.

In the Will of February 18, 1917 both husband and wife mutually appointed each other universal legatees, and determined, that the total combined property should, after the death of the ultimate survivor pass to the two children of the wife, Mrs. Sielcken, in equal shares, whereas the administration and disposal of the entire 1401
estate should remain in the hands of the executors of the Will. The following were appointed executors of the Will:

Gustav Diederichsen and Georg Georgius in Hamburg
Karl Isenberg in Travenort (Hollstein), and
Richard Isenberg in Tessin (Mecklenburg),

with the proviso that, in the event of one of the executors not being able to accept the appointment or to continue to perform the duties thereof, the survivor shall be entitled to indicate or nominate a new executor to be appointed by the competent Probate Court, so that there shall at all times be three executors in office.

II.

The testator Hermann Sielcken was the personally liable partner in the partnership firm of Crossman &

1402 *Exhibit C Annexed to Answering Affidavit of Brainard Avery*

Sielcken in New York, in which he held all the capital; he was only entitled to one half-share of the profits of the firm. This firm, during the war, and by virtue of an agreement with the "Reichseinkauf" (Official Buying Board) had undertaken to supply and deliver several shiploads of foodstuffs to neutral baltic ports, to the maximum value of Mks. 600,000.—, and effected the corresponding shipments. Four of the six ships fitted out by Crossmann & Sielcken were, after their arrival at
1403 Copenhagen, compelled by Government order to return to England, where three ships and their cargoes were sequestrated.

On account of these cargoes the "Zentral Einkaufs-Gesellschaft m. b. H. in Berlin" (Central Buying Company Inc.), a successor of the "Reichseinkauf," in accordance with the arbitration agreement entered into on December 31, 1917 with Attorney-at-Law Dr. Kaemmerer in Hamburg as the legal representative of the executors of the Sielcken estate, brought an action against the Sielcken estate, represented by the executors G. Diederichsen and G. Georgius—the partners in the firm of Theodor Wille in Hamburg—Karl and Richard Isenberg, with
1404 the object of obtaining a judicial declaration that they (the corporation aforesaid) were not obliged to pay for the cargoes shipped by Crossmann & Sielcken to Copenhagen in March and April 1915 by the steamers "United States," "Hellig Olaf," and "Gunborg." This action was decided in petitioner's favor as regards the cargo of SS Gunborg, by interim award dated May 31, 1919; as regards the rest of the petition, however, it was determined and declared by interlocutory decree as a matter of principle, that the risk of the incidental loss and sequestration of the cargoes of SS United States and SS Hellig Olaf had to be borne by the vendors.

In pursuance of this decision the following arrangement was arrived at between the contending parties:

The Sielcken estate waives its claim for payment for the six ships' cargoes, with the exception of the cargo of the SS United States, for which payment shall be made by the Z.E.G. The estate takes over three fourths, the

Exhibit C Annexed to Answering Affidavit of Brainard Avery 1405

Z.E.G. one fourth share of the costs of the action. The firm of Crossmann & Sielcken undertakes to hand over to the Z.E.G. everything it has received or may receive on account of the cargo of the SS United States, and likewise to support the Z.E.G. in every possible way in its persecution of claims for compensation against third parties, for instance the British Government. At the same time the Sielcken estate, represented by the executors, will see to it that no claims contrary to this arrangement are put forward by the firm of Crossmann & Sielcken; the estate should more especially be under an obligation to absolve and protect the Z.E.G. from every future claim by Crossmann & Sielcken, not provided for in this arrangement, for indemnification on account of said six cargoes. 1406

Under date August 3, 1918 the four executors of the Sielcken estate, in a communication signed by them and addressed to the Z.E.G. expressly acknowledged and confirmed their responsibility for the recognition by Crossmann & Sielcken of the aforesaid arrangement, and likewise that they, in their capacity as executors of the Sielcken estate were prepared to absolve the Z.E.G. from every claim which at some future date might possibly be made by Crossmann & Sielcken in connection with payment for the cargoes in question. 1407

III.

The executors G. Diederichsen and G. Georgius are the partners in the firm of Theodor Wille in Hamburg, which firm was, by private arrangement, interested as to one half-share in the Crossmann & Sielcken consignment.

IV.

It is asked:

a) according to the law of which country should Hermann Sielcken's Will of February 18, 1917 be dealt with?

1408 *Exhibit C Annexed to Answering Affidavit of Brainard Avery*

b) Whether German or United States law is applicable to the executors of his Will;

c) Whether the guarantee declared and undertaken by the executors of the Will in the name of the Sielcken estate in connection with the arrangement with the Z.E.G. is valid and effective in law, more especially whether the undertaking of the guarantee constitutes a violation of the trust and official duties incumbent upon the
1409 executors;

d) Whether the widow Clara Schwarz-Sielcken as the heiress of Hermann Sielcken is entitled to take action for compensation against the executors, and whether she is legally competent to proceed in the Courts against them.

In re a)

The fact that the testator Hermann Sielcken, in his Will drawn in due legal form in accordance with Art. II of the Introductory Law to the German Civil Code in
1410 combination with §2231 fig. 2 German Civil Code, made German law the basis of his last Will and Testament, does not by any means obviate the necessity for an inquiry into the question as to which laws of succession or inheritance (*i. e.* German or American) are applicable to the case under consideration.

Inasmuch as Hermann Sielcken was an American Citizen, and at the time of his death his place of residence was Baden-Baden, the law of succession or inheritance in this case is first of all governed by Art. 25 of the Introductory Law to the German Civil Code, according to which the estate of an alien, residing at the time of his death in this country, passes to his heirs in accordance with the laws of the country of which he was a National at the time of his decease. Here, in accordance with both written authorities and the established practice of the Courts, we must start from the fundamental principle,

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that Art. 23 belongs to that category of regulations, which compulsorily restrict the sphere of applicability of German law, and that its wording "beerbt wird" (*i. e.* the estate passes to) in the same manner as in Art. 24 plainly and simply embraces all matters and conditions in connection with succession and inheritance, consequently inter alia also the validity of Wills and Testaments, the order of succession prescribed therein, and the legal status of executors. (Compare Planck Note 3 to Art. 25; Niedner Note 1 to Art. 25, and Note 6 to Art. 24; Staudinger-

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Kuhlenbeck Prefactory Notes to Art. 24 and 25, and Note III to Art. 25 in connection with I, 3 to Art. 24; Walker; International Civil Law, page 895, Niemeyer in Bohm's Journal of International Civil Law etc. XI 1902, page 371, and Supreme Court of the Reich Z Volume 91, page 139).

There is, however, an exception to the rule of Art. 25, embodied in Art. 27, which provides that, in so far as according to the law of the foreign State (the laws of which are in Art. 25 declared to be authoritative and conclusive) German law is to be applied, the latter shall be so applied.

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It is, therefore, in the first place incumbent upon us, in accordance with the laws of the United States, as the State of which the testator at the time of his decease was a National, to investigate (taking as our standard not merely the facts as before us, but also guided by "concurrency") (see Supreme Court Z. 78 page 234 ff), whether the testator was legally entitled to dispose of his estate in accordance with German law in the manner adopted by him in his Will of February 18, 1917; furthermore, to investigate whether, in so doing, he did not violate certain restrictions imposed upon his powers of testation by the laws of his own country, or whether he disregarded any rules or regulations enacted by American law relative to the disposal of his property in due legal form.

With such facts as are before us at the moment it is not possible to pronounce a definite conclusive opinion on this question, inasmuch as the contents of the joint

1414 *Exhibit C Annexed to Answering Affidavit of Brainard Avery*

Wills made by the testator Sielcken and his wife in New York on March 23, 1914 are not known to us here, and as it cannot be determined whether, and if so to what extent, differences in or deviations from the wording thereof affect the validity of the Will of February 18, 1917 according to American law.

Should that not be the case, and if the testator Hermann Sielcken was in no wise restricted in his powers of testation by the laws of his own country, and if, finally,
1415 taking into consideration the effect of the war upon the legal relationship between the two countries, Niemeyers point of view in his opinion on Succession to Citizens of the United States (Bohm's Journal 1902 page 369) still holds good, namely that the inheritance of personal property is to be judged and dealt with according to German and not according to American law, because the law of the testator's country in this respect contains a provision referring the question back to German law, then and in that case the Will of February 18, 1917, in accordance with Art. 27 Introductory Law to German Civil Code, must be interpreted according to the German Civil Code.

1416 In re b)

The same answer applies to the question of the law to be applied and to govern the status and liability of the executors of the Will. If, in accordance with the standards of concurrency in American Law, there is no reference back to German law, then American law must also be applied in forming judgment upon the legal status and liability of the executors, inasmuch as the provisions of Art. 25, as already demonstrated in the foregoing, embrace and govern and regulate all matters in connection with succession and inheritance.

In re c)

If, on the other hand, German law is applicable, it is necessary, (when investigating the question whether the arrangement entered into by the executors of the Sielcken

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estate, for the settlement of the action brought by the Z. E. G., and also whether the guarantee undertaken by them in their written declaration dated August 3, 1918, securing the Z. E. G. against all claims for compensation brought forward by Crossman and Sielcken, constitute a violation of the trust and official duty imposed upon them to start in our arguments from the following considerations:

The executor is the holder of an Official position in the eyes of the law, in other words he is neither the representative or agent of the testator, nor of the estate, nor of the heirs. "§181 of the German Civil Code, which presumes that a representative is a person who enters into a contract or binding engagement with himself or with another person, whom he also represents, does not apply to the executor of a Will. (See Supreme Court of the Reich Z. 61, page 139/145)." The executor's duty is to carry out the testamentary instructions of the testator (§2203 German Civil Code), to procure and effect mutual agreement between co-heirs (§2204), and to administer the estate (§2205). In their duties, their right of disposal over property constituting the estate, their right to take possession, and to enter into contracts and obligations for the due and proper administration of the estate, the executors of the Sielcken estate have in no wise been confined or restricted by the Will of February 18, 1917. They were therefore, as such, also authorized to enter into an undertaking with the Z. E. G. of the magnitude under discussion, provided such an undertaking was necessary within the confines and limits of due and proper administration of the estate.

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The law has, however, erected a barrier against and limiting the rights of disposition of executors, in §2205 Sentence 3. German Civil Code, according to which the executor is only empowered to dispose of the estate or parts of same *free of charge* (that is to say, without receiving valuable consideration in return) in so far as such action is in accordance with a moral obligation or common consideration and decency. All other disposi-

tions by executors, without valuable consideration in return are unlawful; they are simply null and void, ignoring the fact that the recipient knew, and null and void even with the consent of th heir. (Supreme Court of the Reich 74, page 218-105, page 250).

If, therefore, the executors Diederichsen and Georgius, as the partners of the firm of Theodor Wille, were by private agreement interested to the extent of one half share in the undertakings of Crossman & Sielcken, and
1421 if they, in connection with the giving of the guarantee, have not bound themselves to indemnify the Sielcken estate to the extent of and in the amount of their share, we are confronted with a disposal of part of the estate in their own favor, without giving valuable consideration in return, a disposal of no legal value or effect as regards the heirs of Hermann Sielcken.

The invalidity of the obligations undertaken in the guarantee arrangement, insofar as the heirs to the Sielcken estate are concerned, is moreover also demonstrated by the fact, 1) that the above named executors Diederichsen and Georgius assisted and took part in this transaction, although in view of their personal interest,
1422 as partners, in the dispute with the Z. E. G.; they were legally debarred from doing so for personal reasons, and because 2) according to §5 Section 2 sentence 2 of the Will of February 18, 1917 there must always be at least *three* executors in Office. Owing to the aforesaid legal obstacle or hindrance the executors Diederichsen and Georgius were in the sense of §2224 Sect. 1, Sentence 2 German Civil Code, non-existent, eliminated, in the eyes of the law. On the other hand, the other two executors by themselves alone were not authorized to enter into legally binding engagements on behalf of the Sielcken heirs, as, in accordance with the above argument, in §5 Sect. 2 sentence 2 of the Will of February 18, 1917 the testator expressly prescribes that there must always be at least *three* executors in office, so that only this minimum number of executors were empowered to act effectively in law for the estate.

Exhibit C Annexed to Answering Affidavit of Brainard Avery 1423

Any other interpretation of the testator's instructions in this direction is inadmissible, as the wording of the Will "im Amte sein—to be in office" is equivalent to the laws phraseology "das Amt Fuhren—to perform the duties of the office." (§2224, Sect. 1 German Civil Code), and cannot in any way be interpreted as merely meaning, that the Will of the testator, which according to §§2216 Sect. 2, and 2224 Sect. 1, sentence 3 is all that matters, has been adequately complied with if at least three executors have been appointed and only part of them actually functions. (das Amt Fuhrt=performs the 1424 duties or functions of the office.)

Nor is it possible to form a contrary conclusion from §5 Section 3 of the Will of February 18, 1917, because the authority here granted to the executors to delegate their respective powers to each other to any extent desired, can only apply *to such* executors as are in office, as are functioning, as are performing the duties of the office, but not to such as are eliminated, personally debarred by law.

(The case decided by the Supreme Court of the Reich in Z Volume 61 page 139 differs somewhat from the case to which this Opinion relates, insofar as in that case 1425 there was no question of the will of the testator differing from, being at variance with the measures taken to secure mutual agreement amongst the co-heirs, nor was there any concurrency of interests on the part of the executors).

The guarantee undertaken by the executors of the Sielcken estate to safeguard and indemnify the Z. E. G. against all future claims for compensation by Crossman & Sielcken is therefore invalid and of none effect, and constitutes a culpable violation of their official duties, because 1) they have acted in defiance of the express directions of the testator, and because 2), insofar as the executors Diederichsen and Georgius have taken part in that arrangement, it is a case of having to their own personal profit, disposed of part of the estate with obtaining valuable consideration in return.

1426 *Exhibit C Annexed to Answering Affidavit of Brainard Avery*

In re d)

The heiress Clara Schwarz-Sielcken is, in accordance with §2219 of the German Civil Code, entitled to compensation from the executors personally for culpable violation of their official duties, and legally authorized and justified in taking legal proceedings against them. She is especially entitled, in accordance with §2227, as an interested party, to apply to the Probate Court for the
1427 dismissal of the executors, as there is an "important reason" in the sense of the law entitling an heir to make such an application, to wit: culpable neglect of official duty (compare Commentary of Counsellors of the Supreme Court of the Reich on the German Civil Code Note 2 on §2227).

V.

I therefore, on the basis of the foregoing arguments, arrive at the following summarized conclusions:

a) The Will of February 18, 1917 must be interpreted,
1428 according to Art. 25 of Introductory Law to German Civil Code, in accordance with the laws of the United States of America. Insofar as the standards of concurrency in the latter contain a reference back to German law, the latter is applicable, as provided by Art. 27, Introductory Law, German Civil Code.

b) The same applies to the legal status and liability of the executors of the Sielcken estate.

c) The guarantee arrangement of August 3, 1918 is invalid and of none effect in German law, and constitutes a culpable infringement of the official duties imposed upon the executors.

d) The heiress Clara Schwarz-Sielcken is entitled to compensation from the executors personally, and fully entitled and competent to take legal action against them.

Berlin, April 10, 1928.

(Signed) NEUMANN
Reichswirtschaftsgerichtsrat

Answering Affidavit of Richard S. Doyle. 1429

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

Equity No. 44-28. 1430

In Proceedings to Vacate Final Decree of December 30, 1929.

State of New Hampshire,
County of Hillsborough, ss:

Richard S. Doyle, first being duly sworn, deposes and says: 1431

That he is an attorney at law residing in Bethesda, Montgomery County, State of Maryland, and has for more than twelve years been engaged in the practice of law in the City of Washington, D. C., and now has his offices at 404 Transportation Building, in that City.

That during the years 1927 to 1930 inclusive, he was engaged in the practice of law in Washington with Charles D. Hamel, Esq. That he and Mr. Hamel were employed by and associated with the law firm of Barnes, Avery & Whiting of New York in representing Mrs. Clara Sielcken Schwarz and the estate of Herman Sielcken in claims filed with the Mixed Claims Commission—United States and Germany, Docket Nos. 8304 and 8305, the first involving the depreciation of funds of the firm of Crossman & Sielcken invested in German bonds and the second

1432 *Answering Affidavit of Richard S. Doyle.*

claim, representing the loss of certain cargoes of food stuffs shipped by Crossman & Sielcken to an agency of the German Government, through neutral ports, and seized by the British in 1915 and 1916.

Deponent and Mr. Hamel were so associated with Messrs. Barnes and Avery also in this suit instituted in the District Court of the United States for the Southern District of New York against the Alien Property Custodian, the Treasurer of the United States and the Zentral Einkaufs-Gesellschaft (hereinafter referred to as Z. E. G.) covering the amount of the second claim for loss of
1433 cargoes of food stuffs shipped to Z. E. G. in 1915 and 1916 and seized by the British. That suit was filed late in the fall of 1927 and some time after the Memorial for claim of the same amount had been filed with the Mixed Claims Commission.

Some time in February, 1928, deponent had a conference at the office of Mr. Martin of the Mixed Claims Commission with Dr. von der Decken of the office of the German Agent, Mixed Claims Commission, and learned that he had received a cable from Berlin asking him to investigate these claims and especially the suit above referred to. Dr. von der Decken stated that the German
1434 Government was very much disturbed about the proceedings having been instituted in Court on the same claim that was pending before the Commission; that they could not see wherein Crossman & Sielcken would benefit by a recovery in either of these actions in the United States because the Sielcken estate would be held liable under a certain indemnity agreement executed in Germany following the arbitration and settlement in 1918 of matters between Sielcken's estate and Z. E. G. He stated that he would like to avoid, if possible, the employment of counsel and continuance of unnecessary litigation in the United States and offered to furnish us copies of these documents, which he later did.

Deponent had a further conference with Dr. von der Decken in March, 1928, after the usual default order had been issued by the Court against Z. E. G. for failing to appear, and deponent assured Dr. von der Decken that

that order was a technical one, that we would not take advantage of the order, and would consent to the Court's issuing an order granting Z. E. G. permission to file an appearance after the conclusion of certain conferences in Berlin regarding the pending claims before the Mixed Claims Commission.

Deponent conferred from time to time during the year 1928, with Thomas E. Rhodes, Esq., a member of the Department of Justice, representing the Alien Property Custodian and the United States Treasurer in this suit, and advised him of the amount of the claim against the fund in the hands of the Alien Property Custodian, and 1436
the status of the pending claims before the Mixed Claims Commission, as well as the status, from time to time, of the attempted negotiations for settlement of those claims, and, in the fall of 1928, informed Mr. Rhodes that counsel had decided to proceed to trial of this suit against Z. E. G. on the claim for loss of the amount invested in the cargoes. Deponent, together with Mr. Earl B. Barnes, discussed with Mr. Rhodes the matter of entering into an agreed stipulation of many of the facts involved.

That under date of December 7, 1928, deponent addressed a letter to Mr. Rhodes explaining and accompanying a proposed stipulation of facts covering documentary 1437
proof, and advised him that it was the intention of counsel to press the case for an early trial, and stated that the documents to be covered by the stipulation were all a part of the record of the Mixed Claims Commission, as would be observed by the Memorial list 636, Docket No. 8305, and at the same time supplied Mr. Rhodes with copies of the said Memorial for claim, exhibits submitted therewith, together with the reply of the German Government recently filed in answer to that Memorial and all exhibits filed by it in support thereof.

In that letter, deponent also called to Mr. Rhodes' attention copy of an opinion rendered by Dr. Neumann, a Judge of the Commercial Court of the Reich, holding that the alleged compromise agreement relied on in the answer of the German Agent was void, which arbitration agreement, together with a certain indemnity agreement,

1438 *Answering Affidavit of Richard S. Doyle*

were included in the exhibits to the German answer and furnished to Mr. Rhodes, as previously stated.

That in May, 1929, counsel entered into a stipulation of the facts in agreement with Mr. Rhodes, in which it was stipulated and agreed that either party might offer in evidence in this suit any portions of the record of the Mixed Claims Commission in the claim heretofore referred to without further authentication. That stipulation was approved on May 24, 1919 by George R. Farnham, Assistant Attorney General.

1439 That in the summer of 1929, the Court, with the consent of plaintiffs, granted Z. E. G. permission to enter its appearance and file its answer in this suit, which it did on the 6th day of September, 1929; and thereafter counsel for Z. E. G. adopted and agreed to the said stipulation, with a slight amendment thereto.

Thereafter counsel for Z. E. G. apparently assumed the burden of the preparation and trial and defense of the said suit.

Deponent thereafter had very few conferences with Mr. Rhodes of the Department of Justice except from time to time pertaining to formal matters concerning the trial of the case.

1440 Mr. Rhodes from that time took the position that the United States was merely a trustee for the funds and that Z. E. G. had the burden of defending this litigation.

Deponent was present at the trial of the case before Judge Caffey in New York, Mr. Rhodes actively participated in the trial, representing the Alien Property Custodian, but the burden of the defense was assumed by counsel for Z. E. G., whose answer raised many points of defense that were not previously presented by the Department of Justice. It was a matter of comment among counsel for claimants that Arthur Garfield Hays, attorney for Z. E. G., made a very able defense of the claims against Z. E. G. and raised every possible point that was known.

That following the memorandum opinion of Judge Caffey, deponent participated, with Mr. Earl Barnes and Mr. Rhodes, in the preparation of the decree which was finally

approved by Mr. Rhodes for the Department of Justice after some controversy with reference to the rate of interest and the said decree was signed by Judge Caffey.

That deponent participated in numerous conferences during the years 1928 and 1929 with representatives of the Mixed Claims Commission with reference to possible negotiations for settlement of the claims pending before that Commission.

After this suit was filed against the Alien Property Custodian, it was generally conceded that there was no possibility of any settlement being consummated while this suit was pending. Deponent recalls that in June, 1442
1929, he recommended to Mr. Avery that we take Mr. von Lewinski, the German Agent, at his word and proceed with the trial of the Z. E. G. suit, he having stated to us in Mr. Martin's office that he would settle the claim when he knew the status of the Z. E. G. money; and that it was our opinion there was nothing to be done by either the German Agent or the American Agent until we had a decision in that case.

On June 20, 1929, deponent advised Mr. Avery as follows:

"He (Martin) agrees with us that if we are successful in the suit then we should seriously consider any offer of 1443
settlement that the Germans desire to submit, and if they fail to submit an offer, then we should proceed with our Wille investigation."

On December 23, 1929, deponent wrote Mr. Avery that

"He (Martin) seems to think there is a good possibility of settling the bond claim on the basis of depreciation of the securities. He wants to get a copy of the stenographic report of Judge Caffey's opinion just as soon as it is available."

On January 9, 1930, deponent took part in a conference at the Mixed Claims Commission in negotiation for settlement of all pending claims between the parties, which also involved a settlement of the indemnity agreement given by the German Executors of Hermann Sielcken's Estate,

and general releases from any and all parties connected with these matters.

That on January 15, 1930, deponent addressed a letter to Mr. H. H. Martin, commenting on his memorandum of the conference of January 9th, in which letter he stated as follows:

"I do not think I can add anything to what you have said except you recall Dr. von Lewinski stated it was impossible to secure a release from Wille on any of the claims against him.

1445 "I do not know that this is important, but it was one of the factors that prompted Mr. Avery later in the day to suggest to Mr. Abramson that some part of this fund should be set aside for a period of time in case Wille should make a claim against the Sielcken Estate."

On February 4, 1930, deponent addressed a letter to Mr. Avery, in which he advised him of the pending negotiations for settlement, as follows:

"The only information that Mr. Martin has is a word that von Lewinski let drop to Mr. Bonynge that the German Foreign Office is having trouble with Theodor Wille in the matter of this settlement. Mr. Martin does not
1446 know what phase of the matter they have taken up with Theodor Wille, but apparently there is some question being raised and perhaps the matter has been instituted by Wille."

On February 6, 1930, Mr. Avery replied to deponent's letter as follows:

"Referring to yours of the 4th.

"Yes, I attach a good deal of importance to von Lewinski's statement that there is trouble with Wille. I also take encouragement from the fact that the struggle seems to be on the German side, without as yet any effort to involve us. I have heard of no trace of Wille taking any interest in New York, in what is going on. You heard me ask von Lewinski if the German Agent had heard directly or indirectly of any claim from Wille and he replied he

had not. Hays told me the same several days ago. And yet, there is a working combination of Hays, Albert, *et al.*, which may yet and still be working."

On February 14, 1930, deponent addressed a letter to Mr. Avery, in which he made the following comment regarding the settlement of any claim made by Theodor Wille:

"I was with you and Mr. Alger in your room at the Willard when you reached the agreement with Abramson to create the trust fund of $200,000.

"It looks as though somebody tipped Wille off that 1448
there was a chance to get a little easy money, because undoubtedly some representatives of Z. E. G. are going to pay Wille a little bit of money rather than have the settlement fall through."

That on February 15, 1930, Mr. Avery replied to that letter, stating as follows:

"Replying to yours of 14th.

"No, I do not agree with you that anybody has tipped off Wille. I suggest the theory that when the corollary was added to our settlement that $100.00 (0) of Z. E. G. cold cash was to remain in New York for three years
Berlin is trying to settle the affair with Wille. I regard 1449
it as a good sign that we have not been called into the negotiation."

On March 17, 1930, deponent attended a conference at the Mixed Claims Commission, at which were present Messrs. Barnes, Avery, Alger and H. H. Martin representing the claimants, and Dr. von Lewinski, Dr. Roth, Mr. Hays and Mr. Abramson representing the German Government, at which it was agreed to accept an award on the Wille claim of $558,827.85 plus interest at 5 per cent per annum from April 1, 1918, thereon, with the understanding that claimants are furnished with a general release by the firm of Theodor Wille covering claims that this firm may have against them, particularly arising out of the Z. E. G. transaction; that the conference was

1450 *Answering Affidavit of Richard S. Doyle*

suspended and Mr. Avery and deponent met with Mr. Hays, Dr. von Lewinski, Dr. Roth and Mr. Abramson, with whom it was agreed by Mr. Hays that he would secure such general release as necessary from Theodor Wille and counsel for claimants agreed, subject to approval of their clients, that the plaintiffs would pay $50,000 of an amount of $100,000 which Hays would pay to Wille for such a general release of all claims Wille may have against the Sielcken estate, Mrs. Sielcken, the German executors, the Columbia Trust Company, and Crossman & Sielcken.

1451 That deponent conferred with Mr. Rhodes from time to time during January, February and March, 1930, with reference to the pending negotiations for settlement of said claims and that he informed Mr. Rhodes generally of the status of said negotiations and the necessity of settlement of the German indemnity agreement with said claims.

That on March 31, 1930, Rhodes advised deponent that he had prepared a report and recommendation on March 28th to the Solicitor General, that no appeal be taken from Judge Caffey's decision, which report had been approved by the Solicitor General.

1452 Deponent further says that neither he nor any of his associates contemplated at any time the recognition of any claim by any persons other than the plaintiffs herein and the American Executor of Sielcken to participate in any recovery under this judgment, but that in reaching the settlement of the awards before the Mixed Claim Commission and the indemnity agreement asserted by Z. E. G., it was, in view of the threats advanced in the name of Theodore Wille, essential to secure complete releases of all possible claims that Theodor Wille might, despite their previous disclaimers, attempt to assert.

This was the more necessary because the individual estate of Herman Sielcken in Germany was very large and subject to attack there. Z. E. G. and the firm of Wille were insisting on immediate cash settlement and as the funds recovered under the judgment herein were going to be immediately available (as otherwise the American

executor would probably have no available funds for several weeks to meet the required payments) it was agreed that the funds collected under the judgment herein should be used to conclude the settlement.

Payment of $50,000 to Mr. Hays to secure releases from Theodor Wille was not made on the strength of any claim of Theodor Wille to participate in this recovery, for no such claim was ever asserted to us, but simply as a means of securing the complete release from Theodor Wille that we felt it necessary to have in view of the indefinite threats advanced in the name of that firm, of which we knew no more than that Theodor Wille would make trouble in some way if this demand were not complied with. 1454

As the settlement, after making these payments, would still result in a recovery by the plaintiffs and the estate of a net sum in excess of what we had been authorized to settle for, we felt justified in accepting the settlement on this basis provided our demands for absolute protection of any further claims on the part of the firm of Theodor Wille were fully met.

Deponent says that he does not know and has never heard of Mr. Sterck, of the Department of Justice, but that to his personal knowledge he did not have at any time any personal connection with the claims before the Mixed Claims Commission or the suit in the Southern District of New York. 1455

Deponent has reviewed the facts set forth in the affidavit of Brainard Avery in this matter and where reference is made to facts and matters concerning deponent, they are true and correct.

RICHARD S. DOYLE.

Subscribed and sworn to before
me this 11th day of August, 1938.
Ivory C. Eaton,
Notary Public.
My Commission expires August 15th, 1940.
(Notarial Seal)

1456 **Answering Affidavit of Charles D. Hamel.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE IN PROCEEDING TO VACATE DECREE.] Equity No. 44-28

District of Columbia,
City of Washington, ss:

Charles D. Hamel, being first duly sworn, deposes and says:

That he has been a member of the bar since 1909;
1457 that from 1909 to 1914, he was engaged in legal work for the Department of the Interior of the United States and special assistant to the Attorney-General of the United States for the trial of cases in California and Wyoming from 1915 to 1922; from 1922 to 1924, deponent was Chairman of the Commission on Appeals and Review, and from 1924 until March 30, 1925, was a member and Chairman of the United States Board of Tax Appeals. And on retiring from the Board of Tax Appeals in 1925, deponent entered upon the active practice of the law in the City of Washington and ever since has been and is now engaged in the active practice of the law there.

1458 Deponent further says that he was retained in the matter of the claims of Crossman & Sielcken in Liquidation against the Zentral Einkaufsgesellschaft and Theodor Wille, which took the form of the present suit against the Zentral Einkaufsgesellschaft and the Treasurer of the United States and the Alien Property Custodian and the two Memorials filed on these respective claims in 1927 with the Mixed Claims Commission—United States and Germany. The details of these matters, so far as handled in Washington, were very largely handled by deponent's partner, Mr. Richard S. Doyle, but deponent kept in general touch with the same from the filing of the Memorials until the final adjustment of all these matters in 1930.

Deponent was advised by Mr. Doyle and by Mr. Avery of the attitude taken by Mr. Bonynge, the American Agent before the Mixed Claims Commission, and by

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Mr. H. H. Martin, his counsel, that the claims of Z.E.G. against the German Executors of Hermann Sielcken, deceased, for indemnity and any claims that Theodor Wille wished to assert against the firm of Crossman & Sielcken or against the estate of Herman Sielcken were matters extraneous to the jurisdiction of the Mixed Claims Commission and matters that the parties were at liberty to settle between themselves. Deponent thought this view sound.

At no time was there any suggestion by any of the counsel for the claimants or consideration by them of any claim nor did deponent hear of any claim being asserted that either Theodor Wille or Zentral Einkaufsgesellschaft was entitled to participate in any recovery either in this action or under the Mixed Claims Commission award. The thing that was compromised with Zentral Einkaufsgesellschaft was this dangerous claim to be entitled to indemnity from the German executors of Hermann Sielcken for any amount they were compelled to pay under the judgment in the present suit

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The funds recovered in this suit were used for making that adjustment because at the moment they were the only available ones for that purpose, although the estate had large funds coming in shortly.

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As for the claim of the firm of Theodor Wille that they should receive $50,000 from the Sielcken estate as a condition of the firm's executing the releases demanded, this was a last-minute claim advanced after the entry of judgment in this cause and after practical arrangements for complete adjustment of all the matters involved. It was not based on any special claim nor were counsel for the plaintiffs in this cause ever advised, so far as deponent could learn, on what basis that demand was advanced. It was, however, demanded and as the terms of the settlement agreed on were such as to permit of payment of that amount without reducing the net recovery of the firm of Crossman & Sielcken in Liquidation below the point that had been approved by Mrs. Sielcken Schwarz and the executor as a minimum for settlement, counsel for the plaintiffs agreed on making this payment as a means of getting the entire set-

1462 tlement through, which called for payments on the claim against Wille of over $700,000.

In view of the position taken by the American Agent and his counsel, which deponent believed to be sound, deponent saw no objection to making the settlement on this basis and it was accordingly so settled.

Deponent, however, calls particular attention to the fact that this suggestion of a payment to Theodor Wille was first suggested in February or March, 1930, more than a month after the entry of judgment in this cause.

CHARLES D. HAMEL.

1463 Subscribed and sworn to before me this
12th day of August, 1938.
Marvin S. Dooley,
Notary Public.
(Seal)

District of Columbia, ss: No. 96141

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, the same being a Court of Record, having by law a seal, do hereby certify that Marvin S. Dooley, before whom the annexed instrument in writing was executed, and whose
1464 name is subscribed thereto, was at the time of signing the same a Notary Public in and for said District, residing therein, duly commissioned and sworn, and authorized by the laws of said District to take the acknowledgment and proof of deeds or conveyances of lands, tenements, or hereditaments, and other instruments in writing, to be recorded in said District, and to administer oaths; and that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature to said instrument and impression of seal thereon are genuine.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Washington, D. C., the 12th day of August, A. D. 1938.

CHARLES E. STEWART,
Clerk.
By PHILIP M. HAMILTON,
Assistant Clerk.

(Seal)

Answering Affidavit of Frederick Wirth, Jr. 1465

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE IN PROCEEDING TO VACATE DECREE.]

German Reich,
State of Prussia,
City of Berlin, ss:
Consulate General of the
United States of America, 1466

In Proceedings to Vacate Decree of December 30, 1929.

Frederick Wirth, Jr., being duly sworn, deposes and says:

That he is a member of the New York Bar since the year 1906, with offices now located at Lutzowufer 17, Berlin, W. 35, Germany; that, in the course of certain conferences which took place at the Ministry for Foreign Affairs in the City of Berlin, Germany, in the months of April and May, 1928, concerning a matter in which the Zentral Einkaufsgesellschaft, m.b.H was 1467 involved, the representatives of the then German government raised the question of arbitration and confirmed the fact that certain arbitration proceedings which, during the war of 1914-1918, had already been partially carried out between the German executors of Hermann Sielcken and the Zentral Einkaufsgesellschaft, m.b.H all of which resulted in an agreement between the Zentral Einkaufsgesellschaft m. b. H., and the German Executors of Hermann Sielcken under the terms of which the said German Executors of Hermann Sielcken, although admitting their inability to bind Crossman & Sielcken, undertook that if Crossman & Sielcken subsequently recovered anything from the Zentral Einkaufsgellschaft cargoes account, as it was then known, the German Exexcutors of Hermann Sielcken would indemnify and hold harmless the Zentral Einkaufschaft from any such recovery.

1468 *Answering Affidavit of Frederick Wirth, Jr.*

Deponent further states that the representatives of the German government, during the course of these conferences produced and submitted to him many papers and documents on which they relied as showing partial arbitration and the fact that such agreement had been entered into, and they, also, at the same time, submitted a draft of the proposed answer of the German Government to the Memorial submitted on behalf of the Zentral Einkaufsgesellschaft; that one of the representatives of the German Government whose name,
1469 to the best of my recollection, was Zimmermann, proposed, as a compromise, that the Zentral Einkaufsgesellschaft should withhold any defense to a suit in any court in the United States and thus permit our clients to collect out of any funds held by the Treasurer of the United States, to keep such proceeds and to withdraw both memorials. Deponent stated at the time that he would take the proposal under advisement, whereupon the meeting was adjourned for several days.

Deponent further states that he then discussed the whole situation with Mr. Brainard Avery, the New York attorney for Mrs. Sielcken, and that they both agreed it would be quite impossible to accept or even
1470 consider the proposal set forth in the preceding paragraph of this affidavit for two reasons: firstly, because any such proposal was outside or went beyond our instructions and, secondly, by reason of the fact that we would be attempting, in considering such proposal, to deal with matters affecting the interests of the United States and its government which we could not, under any circumstances, take into consideration without first submitting such proposal or proposals to all counsel representing the United States as indicated in the memorials and in the pending suit.

Deponent further states that upon reconvening, he made a formal statement to the German representatives to the effect that neither he nor Mr. Avery aforementioned, could enter into any negotiations with regard

to the proposal referred to in the preceding paragraph for reasons already stated above.

Deponent further states that during a recess which then took place, Mr. von Lewinski, one of the representatives of the German Government, suggested to Mr. Avery, aforementioned, that as a practical solution of the questions involved, all matters be settled upon the following basis: That all defenses be spread upon the record, thereupon omitting certain items in the claim of Theodor Wille amounting to about five hundred thousand ($500,000) Dollars which Mr. von Lewinski claimed 1472
had been previously settled between Mrs. Sielcken, the widow, and Theodor Wille, and that the German and American Agents would agree on a compromise under the terms of which fifty (50) per cent of each of the claims presented by the Memorials would be awarded to the American claimants, and omitting entirely the said five hundred thousand ($500,000) Dollars. The said Mr. Avery then immediately told Mr. von Lewinski that he would discuss that suggestion with deponent, whereupon deponent and the said Mr. Avery discussed the whole matter at length, both deponent and the said Mr. Avery coming to the conclusion that it would be quite impossible to enter into any such pro- 1473
posed arrangement or even consider the possibility of carrying on any negotiations with respect thereto without first submitting it in all of its details to all counsel representing the United States in these matters.

Deponent further states that at the next meeting of the conference which took place shortly thereafter, deponent and the said Mr. Avery informed the German representatives, including Mr. von Lewinski, that it would be absolutely impossible for the representatives of the American claimants, that is to say, for Mr. Avery and deponent, to discuss or negotiate any further with respect to any such proposal as that mentioned in the last preceding paragraph of this affidavit, without first submitting the matter in all of its details to the various counsel representing the

1474 *Answering Affidavit of Frederick Wirth, Jr.*

United States both before the Mixed Claims Commission and in the United States District Court. Mr. Avery added, at the same time, that he would so submit the whole matter upon his return to the United States of America.

FREDERICK WIRTH, JR.

Subscribed and sworn to before me this
29th day of July, 1938.
Carlos J. Warner,
Consul of the United States of America.

1475

(American Consulate Seal
July 29, 1938, Berlin, Germany)

$2.00
Fee Stamp Cancelled
Service No. Fee $2. M 5.20
Item 31 Tariff of fees.

1476

Answering Affidavit of Leonard B. Smith. 1477

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE IN PROCEEDING TO VACATE DECREE.] Equity No. 44-28.

State of Connecticut,
County of Litchfield, ss:

Leonard B. Smith, being duly sworn, deposes and says:

That he is a member of the bar of the State of New 1478
York and has been for over thirty years last past.

Deponent ever since the early part of 1919 has been counsel to the Irving Trust Company, under its various names, as executor of Hermann Sielcken, deceased, advising generally as to the affairs of the estate and the liquidation by said Executor of the affairs of the firm of Crossman & Sielcken.

Deponent further says that at the time he became so connected as counsel with the estate, there appeared on the books of Crossman & Sielcken a charge against the firm of Theodor Wille of Hamburg, Germany, of one half the losses on certain cargoes known as the Copenhagen 1479
cargoes that had been seized by the British Admiralty and condemned by the British Prize Court in late 1917, for the price of which recovery was had in this suit under the decree of December 30, 1929 herein.

In 1922 there was being asserted against the estate of Hermann Sielcken two very heavy claims, one by the Woolson Spice Company for upwards of $1,000,000 and one by a Mrs. Blackwell for a very large amount; and for the protection of the executor and the estate and the claims of these creditors it seemed essential to assert such claims as the executor held as liquidator of the firm of Crossman & Sielcken against the firm of Theodor Wille, of Hamburg, Germany, by Memorials before the Mixed Claims Commission, one of which was for the recovery, if possible, from Germany of the other half of the loss on these seized cargoes.

1480 Mrs. Sielcken, at that time, objected to our asserting this claim, insisting that she had personally made a settlement with the firm of Theodor Wille in Germany of that claim and of all claims that firm had against the firm of Crossman & Sielcken. As counsel for the executor, I took the position that she, merely as residuary legatee of Sielcken's estate, had had no authority whatever to settle claims belonging to the firm of Crossman & Sielcken and that we could not recognize that settlement, especially in view of these heavy claims asserted against the estate (though disputed by the executor).

1481 Mr. Charles E. Hotchkiss, who was Mrs. Sielcken's personal counsel in this country, as I understood him, took the same view as I as to the invalidity of her attempt to settle partnership claims, and that it was essential for the protection of the estate and the executor that we file Memorials for these claims against Wille.

Mrs. Sielcken (then Mrs. Sielcken-Schwarz) finally sent to the Executor a letter dated December 11, 1922, reading as follows:

"New York December 11, 1922

Estate of Hermann Sielcken, deceased.

1482 Dear Sirs:

"Concerning the proposal made at the conference in your office held December 8th, that you, as the executor of Mr. Sielcken's will, should file a claim with the Mixed Commission (constituted under the recent treaty between the United States of America and Germany) to recover an item of approximately $94,000 and interest, appearing upon the dollar account on the books of Crossman & Sielcken as owing from the firm of Theodor Wille, Hamburg, I herewith advise you that as the residuary legatee under said will I have no desire that this item should be enforced as an obligation against said Theodor Wille. If, however, you deem it necessary, for your protection as such executor, to file such claim in order that no claims of creditors against the estate of Mr. Sielcken may be

prejudiced, I desire that when the estate is in such condition that you are charged with no duty to collect said item other than for my personal advantage as residuary legatee, you shall withdraw said claim and prosecute it no further.

I remain,
Very truly yours,

Clara Sielcken Schwarz

Columbia Trust Company, as
Executor of the Last Will and 1484
Testament of Hermann Sielcken, dec'd.
George E. Warren, Esq., Vice-Pres.,
60 Broadway,
New York City."

We then, in 1922, filed three Memorials, in one of which we asked recovery from Germany of the one half of the loss on the cargoes which we alleged had not been assumed by Wille. And in another recovery from Germany and Wille of the balance claimed against Wille including the half of the loss on the seized cargoes. Our evidence of such assumption by Wille was limited, but was necessarily relied on by us. 1485

During 1923 the Woolson Spice and Blackwell cases were both settled and disposed of. No other creditors of the Estate or firm were known, and all bequests other than the residuary bequest to Mrs. Sielcken had either been paid or had lapsed, so that she had become the sole person interested in the estate or in the assets of Crossman & Sielcken.

Under these circumstances her settlement with the firm of Theodor Wille was one that the executor was authorized to adopt; and it did so, in 1924, notifying the State Department that it withdrew the said 1922 Memorials, and jointly with Messrs. Sorenson and Nielsen (the surviving partners of the firm), charging off on the books of Crossman & Sielcken to Profit and Loss the claim against the firm of Theodor Wille that appeared on the

firm books of Crossman & Sielcken, thus adopting the settlement Mrs. Sielcken had previously made of that claim against the firm of Theodor Wille. This was done with her approval and consent.

Such claims against the firm of Theodor Wille were so charged off to Profit and Loss on the books of Crossman & Sielcken under date of February 28th, 1924, the balance so charged off amounting to $118,635.82. Thereafter no claim was made, as far as deponent heard, that the firm of Theodor Wille had any further liability to
1487 Crossman & Sielcken for losses sustained on the seized cargoes, or any interest of any character in the said cargoes or in any recovery therefor.

LEONARD B. SMITH

Subscribed and sworn to before me this
11th day of August, 1938.
Walter W. Collar, Notary Public.
My Commission Expires Feb. 1, 1939.
(Notarial Seal)

Answering Affidavit of William Abramson. 1489

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE IN PROCEEDING TO VACATE DECREE.] Equity No. 44-28.

State of New York,
County of New York, ss:

William Abramson, being duly sworn, says:

I am and for over twenty-five years have been a member of the New York Bar, and since 1920 a member of the Bar of this Court. 1490

Since 1928 I have been associated with Mr. Arthur Garfield Hays, who was the solicitor for the defendant Zentral Einkaufs-Gesellschaft in the above cause, and was his active assistant in the trial thereof.

On January 9, 1930, and on March 17, 1930, I was present, on Mr. Hays' behalf, at the conferences in Washington with Mr. Bonynge (the American Agent before the Mixed Claims Commission), and his counsel, Mr. H. H. Martin, and Dr. von Lewinski (the German Agent before that Commission), and his counsel Dr. Roth, and counsel for the above named plaintiffs (of which Mr. Martin preserved copious notes), at one of which Mr. Hays was also present, over the payment of the judgment herein and the settlement of the claim against Zentral Einkaufs-Gesellschaft under the Memorial of the above named plaintiffs and the American executor of Hermann Sielcken, deceased, against Germany and Zentral Einkaufs-Gesellschaft, which was predicated on the same claim for payment for seized cargoes as was this suit, and the claim of Zentral Einkaufs-Gesellschaft against the German executors of Hermann Sielcken for indemnity from them for any recovery against the Zentral Einkaufs-Gesellschaft on the claims advanced against it in this suit and in the Memorial against it. 1491

1492 *Answering Affidavit of William Abramson*

At the aforesaid conferences the settlement of the claim of the two plaintiffs and the American executor of Sielcken presented by the Memorial before the Commission against Germany and the firm of Theodor Wille was also discussed.

On or about March 24, 1930, and while these negotiations were still formally incomplete, though settlement had practically been attained, I was in Washington and called on Mr. Thomas E. Rhodes, who had been the trial counsel for the Alien Property Custodian and the United States Treasurer on the trial of this cause. I told Mr.
1493 Rhodes that we had had two conferences at the Mixed Claims Commission's offices in connection with the settlement of the Crossman and Sielcken claims involved in this suit and in the proceedings before the Mixed Claims Commission, and the indemnity agreement aforesaid; and that we had reached a settlement thereof. I also advised him that the attorneys for the claimants in the Wille Memorial had likewise reached a settlement. I further advised Mr. Rhodes that as a result of the settlement of the Zentral Einkaufs-Gesellschaft claims, we were not going to appeal from the decree entered herein. Mr. Rhodes then dictated to one of his own stenographers
1494 the short form letter addressed to the Attorney General (marked for Mr. Rhodes' attention), of date March 24, 1930, of which a photostatic copy is annexed to the moving papers. At Mr. Rhodes' request I then signed that letter in Mr. Hays' name and handed it to Mr. Rhodes.

Mr. Rhodes at that time knew of the claim we had been making on behalf of the Zentral Einkaufs-Gesellschaft based on the indemnity agreement with which he was familiar, as it was one of the papers we had filed with the Mixed Claims Commission which Mr. Rhodes had joined us and the attorneys for the plaintiffs in stipulating that they might any of them be put in evidence on the trial of this suit without further authentication. And I believe he knew that part of the settlement we had arranged was that a considerable payment was to be made to the Zentral Einkaufs-Gesellschaft in compromise of

that claim for indemnity, though I do not recall that I discussed any of the details of the settlement with him.

WM. ABRAMSON

Subscribed and sworn to before me this
5th day of August, 1938.
Frederick Griffin,
Notary Public,
New York County.

Seal
N. Y. Co. Clks. No. 382, Reg. No. 0G450.
Kings Co. Clks. No. 166, Reg. No. 397. 1496
Bronx Co. Clks. No. 38, Reg. No. 182G40.
Queens Co. Clks. No. 846, Reg. No. 3304.
Commission expires March 30, 1940.

1497

1498 **Answering Affidavit of George O. Castell.**

[Same Title in Proceeding to Vacate Decree.] Equity No. 44-28.

State of New York,
County of New York, ss:

George O. Castell, being duly sworn, deposes and says:

That he is a member of the bar of the State of New York and has been since 1913.

That in 1927 deponent was a member of the firm of Barnes, Avery & Whiting, and, under instructions from
1499 Mr. Avery of that firm, went to Germany to see what could be found in the way of facts and evidence connected with the claims asserted in the two Memorials filed by the firm of Crossman & Sielcken with the Mixed Claims Commission, United States and Germany, against Germany impleaded with Zentral Einkaufsgesellschaft and Germany impleaded with the firm of Theodor Wille.

Deponent went first to Hamburg and there had brief conferences with Mr. Lorenz of the firm of Theodor Wille and with Dr. Baur, a German attorney, who had formerly been connected with Dr. Ami Kaemmerer, who had acted as counsel for the German Executors of Hermann Sielcken in connection with the partially completed arbitra-
1500 tion between the German executors and the Zentral Einkaufsgesellschaft and an agreement between them.

Dr. Kaemmerer had died before deponent came to Hamburg.

After spending a short time in Hamburg, deponent went to Baden-Baden and there found among the files of the late Hermann Sielcken in his library there the key documents which formed the basis of the claim later filed with the Mixed Claims Commission and still later asserted in this suit, that the Reichseinkauf had been the original contracting party for the cargoes involved in this suit and that its interest therein and liability therefor had been assumed by the Zentral Einkaufsgesellschaft.

After securing these documents in Baden-Baden, deponent returned to Hamburg and there, at that time, was shown by Dr. Baur the files of Dr. Kaemmerer in connection with the said incomplete arbitration and the

so-called indemnity agreement executed by the German Executors of Sielcken to the Zentral Einkaufsgesellschaft.

Deponent promptly advised Mr. Avery in New York by letter of his discoveries, and shortly thereafter Mr. Avery came to Hamburg and met deponent there.

On these two visits to Hamburg, deponent talked with both Mr. Lorenz and Dr. Baur, and no suggestion was ever made by any one there that the firm of Theodor Wille had any claim against the firm of Crossman & Sielcken of any character.

On Mr. Avery's arrival in Hamburg deponent explained what had previously been written to Mr. Avery, showing him all the papers he had been able to find, and explaining to him in detail all he knew concerning the incomplete arbitration and the indemnity agreement. 1502

Mr. Avery promptly raised the question of the possible invalidity of the so-called indemnity agreement by reason of the dual position in connection with it occupied by the German executors.

Deponent spent many weeks in Germany examining all possible records connected with these claims that deponent could get in touch with and securing copies of them as far as possible, and deponent returned to the United States with Mr. Avery about the end of September, 1927. 1503

Deponent further says that he continued to be a partner of Mr. Avery until after 1930.

During the period from 1927 to 1930, deponent repeatedly talked with Mr. Barnes (who is now dead), who spoke to deponent several times of his having been to Washington to see Mr. Thomas E. Rhodes there in connection with the above entitled suit.

GEORGE O. CASTELL.

Subscribed and sworn to before me this
25th day of July, 1938.
Florence D. Joyce,
Notary Public,
New York County.
N. Y. Co. Clk's No. 127, Reg. No. 9J113.
Bronx Co. Clk's No. 16, Reg. No. 42J30.
Commission expires March 30, 1939.
(Notarial Seal)

1504 **Answering Affidavit of George E. Warren.**

[Same Title in Proceeding to Vacate Decree.] Equity No. 44-28.

State of New York,
County of New York, ss:

George E. Warren, being duly sworn, deposes and says:

That he resides at Stamford, in the State of Connecticut.

That he is, and ever since April 1st, 1925, has been, a vice president of the Chase National Bank of the City
1505 of New York.

That prior to becoming connected with the Chase National Bank in April, 1925, deponent had been a vice president of the Columbia Trust Company (now the Irving Trust Company), for over eight years, up to the middle of March, 1925.

That from the 30th of November, 1917, until deponent's leaving the Irving Trust Company in March, 1925, deponent had been in direct charge of the relations of the Trust Company with the firm of Crossman & Sielcken and the estate of Hermann Sielcken, first from November 30, 1917, until about January 23, 1918, as representative of
1506 that Trust Company as Agent of the Alien Property Custodian, when that agency came to an end, and that from December 27, 1917, until the 26th day of January, 1918, deponent was in active charge for said Columbia Trust Company of the estate of Hermann Sielcken, deceased, while said Columbia Trust Company was temporary administrator of the estate of Hermann Sielcken, deceased.

That on the 26th day of January, 1918, the will of said Hermann Sielcken, deceased (of which a copy is annexed to the moving papers of the Attorney General herein as Exhibit B thereof), was duly admitted to probate by the Surrogate of New York County, and the said Columbia Trust Company received letters as executor of the said will of said Sielcken and immediately took over all the American property belonging to his estate.

as such executor including all his interest in the firm of Crossman & Sielcken.

That thereafter deponent remained in prime charge for the Columbia Trust Company under its various names of said estate of Hermann Sielcken until deponent resigned from the Trust Company in March, 1925.

Throughout that entire period from November 30, 1917, to deponent's resignation in March, 1925, deponent had primary charge of all the affairs relating to said estate of Hermann Sielcken and said partnership of Crossman & Sielcken, which was liquidated by the executor with the 1508
aid and assistance of Messrs. Sorenson and Nielsen as directed in the said will of said Hermann Sielcken, deceased.

Throughout that entire period from November 30, 1917, until deponent's resignation from the Trust Company in March, 1925, deponent was the officer of said Trust Company having the entire charge of the affairs of said firm of Crossman & Sielcken and of the estate of said Hermann Sielcken, deceased, subject only to the supervision of Hon. Willard V. King, the president of said Trust Company.

Deponent further says that the matter of the affairs of Crossman & Sielcken first came into his hands on the 1509
30th day of November, 1917, through the appointment of the Columbia Trust Company by the Alien Property Custodian to supervise, as his representative, the liquidation of said firm of Crossman & Sielcken. Such appointment was contained in the letter of November 30, 1917, of which a copy is annexed to the moving papers of the Attorney General of the United States herein as Exhibit G of the moving affidavit of Mr. Sterck. Enclosed in said letter were two copies of the license of November 16, 1917, issued to Sorenson and Nielsen above named by the War Trade Board, dated November 16, 1917, of which a copy is annexed to the said moving papers of the Attorney General as Exhibit F thereof, and also notice of the appointment of Mr. Bower.

That on November 30, 1917, deponent, as Vice-President of the Columbia Trust Company, acknowledged re-

ceipt of said letter from the Alien Property Custodian's Manager, Joseph A. Bower, Esq., by a letter of the same date, of which a copy is annexed to the said moving papers as Exhibit H4 thereof.

Pursuant to that authority, deponent, on behalf of the Columbia Trust Company, promptly took over possession of the negotiable securities in possession of the firm and deposited them in the vaults of the Trust Company, opening an account therefor, headed: "A. Mitchell Palmer, Custodian, for Crossman & Sielcken Liquidation
1511 Investment Account." A photographic copy of the said ledger account is hereto annexed, marked Exhibit A, and hereby made a part hereof.

Upon the turning over of possession of the assets of Crossman & Sielcken to the Columbia Trust Company as temporary administrator and as Executor of Hermann Sielcken, the title of the said account was changed by striking out the words "A. Mitchell Palmer, Custodian for" and replacing the same with the words "Est. Hermann Sielcken." Thereafter the account was carried in the name "Crossman & Sielcken in Liquidation, Investment Account, Est. Hermann Sielcken," as more fully appears by the copy of the first page of the new account,
1512 of which a photostatic copy is hereto annexed, marked Exhibit B, and the account of said securities was thereafter carried on under the latter title.

Just before said appointment of November 30, 1917, a rumor had reached the officers of the Columbia Trust Company that Sielcken had died in Germany and in the files of the Trust Company I find a letter from the President of the Company, Mr. King, to Mr. Bower, Business Manager of the Alien Property Custodian, dated November 27, 1917, advising him of the receipt of this information, but that it was unofficial, of which a copy is hereto annexed, marked Exhibit C. At the time of writing that letter, the Trust Company made an application to the Secretary of State to obtain information as to the possible death of said Hermann Sielcken, and his death on October 8, 1917, was subsequently confirmed by a telegram from the Department of State.

On or about the 17th day of December, 1917, the Trust Company received from Messrs. Sorenson and Nielsen (Hermann Sielcken's former partners) definite information of the death of said Hermann Sielcken on October 8, 1917, and thereupon the Trust Company obtained from the former partners of said Sielcken, Messrs. Sorenson and Nielsen, the said will of said Hermann Sielcken, deceased, and delivered the same to the late Eugene Smith of New York City as attorney for the Trust Company to present the same for probate to the Surrogate of New York County. The same was promptly presented for 1514
probate, but the necessity of publishing citation required delay of a month or more and for the purpose of being able to handle any questions coming up with regard to the estate in the matter, the Trust Company caused application to be made to the Surrogate for its own appointment as temporary administrator pending probate of the will.

A memorandum that such application for temporary letters of administration was granted was handed down by the Surrogate on or about the 26th day of December, 1917, and the same day deponent sent to the Alien Property Custodian, the letter suggesting that the entire property of the estate and that of the firm of Crossman & 1515
Sielcken should be left to the temporary administrator of Hermann Sielcken, and in succession to his executor, to administer, pointing out that Sielcken had died on October 8th, 1917 (which was before the appointment of any Alien Property Custodian under the Trading With the Enemy Act, which became a law only on the 6th of October, 1917). No seizure of either the assets of the firm of Crossman & Sielcken or of the assets of Hermann Sielcken had been made by the Custodian. Nor had either said Sielcken or said firm been declared an enemy by the Custodian at any time prior to the death of said Hermann Sielcken. A true and correct copy of such letter is hereto annexed, marked Exhibit D, and hereby made a part of this affidavit.

Deponent further says that on the 20th day of December, 1917, deponent had a personal conference with Mr.

Joseph A. Bower, Business Manager of the Alien Property Custodian, of which deponent at the time made and filed a minute, of which minute a true and correct copy is hereto annexed, marked Exhibit E and hereby made a part of this affidavit.

Deponent further says that on or about the 14th day of January, 1918, the Columbia Trust Company received from Mr. Bower, the Business Manager of the Alien Property Custodian, a letter approving the taking over of all the property of the firm of Crossman & Sielcken
1517 and all the American estate of Hermann Sielcken, deceased, as temporary administrator, and later as executor, of which letter a true and correct copy is hereto annexed, marked Exhibit F, and hereby made a part of this affidavit.

Pursuant to the suggestion contained in that letter, Exhibit F, application was immediately made to the War Trade Board, which, on the 21st day of January, 1918, issued two permits, one to the Columbia Trust Company as temporary administrator and as executor of Hermann Sielcken, the other to Messrs. Sorenson and Nielsen, true and correct copies of which licenses so issued by the War Trade Board are hereto annexed, marked respective-
1518 ly Exhibits G and H, and hereby made parts of this affidavit.

That on the 26th day of January, 1918, letters testamentary were issued to the Columbia Trust Company under the said will of said Hermann Sielcken, deceased, a copy of which letters is annexed to the moving papers herein of the Attorney General as Exhibit J; and all the property of the estate of Hermann Sielcken and of the firm of Crossman & Sielcken was at once taken over by the Columbia Trust Company as such executor and the agency of the Columbia Trust Company for the Alien Property Custodian was terminated, its fees fixed by the Alien Property Custodian at $7,500, and that sum paid to the Columbia Trust Company out of the assets of Crossman & Sielcken on the 25th day of January, 1918, and from the 25th day of January, 1918, the Trust Com-

pany ceased to hold the position of Agent for the Alien Property Custodian in holding possession of any assets of the firm of Crossman & Sielcken.

Deponent further says that after November 30, 1918, two reports were prepared by the firm of Arthur Young & Co., Certified Public Accountants, one of the firm's condition on September 30, 1917 and the other of an extension thereof, so as to show the condition of the firm on October 8, 1917, the day of Sielcken's death; copies of which two reports are hereto annexed, marked Exhibits I and J respectively, and hereby made parts of this affidavit. 1520

Deponent further says that in the early part of the year 1918 there was considerable correspondence between the Trust Company, conducted on its part by deponent, and the representatives of the Alien Property Custodian and others, which very clearly shows that at that time the property of the firm of Crossman & Sielcken and the property of said Hermann Sielcken was held by the executor of Hermann Sielcken and not by the Alien Property Custodian. Among such letters are letters from deponent of February 4, 1918, to Mr. H. M. Kilbourn, the Assistant Business Manager of the New York Office of the Alien Property Custodian (Mr. Bower's assistant); 1521 of June 14, 1918 to Mr. Bower, the General Business Manager of the Alien Property Custodian; and of July 16, 1918 to Mr. Morgan M. Mann, who was the counsel to the Alien Property Custodian in charge of his relations with the Sielcken Estate; and also letters, one from said Bower to deponent of April 16, 1918; one of June 3, 1918 from F. J. Horn, who was Director, Bureau of Trusts, to the Columbia Trust Company; one of June 19, 1918 from said Bower to deponent; one of July 16, 1918 from said Morgan M. Mann to deponent. True and correct copies of said nine several letters are hereto annexed, marked Exhibit K, and hereby made parts of this affidavit.

Deponent further says that by the end of the summer of 1918 the Columbia Trust Company as such executor

1522 *Answering Affidavit of George E. Warren*

of said Hermann Sielcken, deceased, had realized a large amount of cash for the estate of Hermann Sielcken from said partnership, which the executor was liquidating, amounting to over One million Dollars; and in October 1918 the Alien Property Custodian caused to be served on the Columbia Trust Company a demand for the interests of Clara Sielcken, the widow and residuary legatee of said Hermann Sielcken, deceased, in his estate, and also the interests of various other persons therein, copy of which demand was served on deponent as Vice-President of the Columbia Trust Company on the 25th day
1523 of October, 1918; copy of which is hereto annexed, marked Exhibit L, and hereby made a part of this affidavit.

Deponent further says that said Exhibit L is the only demand ever made by the Alien Property Custodian on the Columbia Trust Company for any part of the estate of Hermann Sielcken or for any of the property of the firm of Crossman & Sielcken, nor did the Alien Property Custodian ever advise the Columbia Trust Company that any one connected with the estate or with the firm was regarded as an enemy except only as shown by the documents hereto annexed.

Deponent further says that reports were regularly
1524 made to the Alien Property Custodian of the progress of the administration of the affairs of Crossman & Sielcken as requested by him in the letter of November 30, 1917, so that he might know what was going on, and this demand, Exhibit L, is the only demand made.

Deponent further says that after coming into charge of the estate of Hermann Sielcken and being put in supervision of the liquidation of the firm of Crossman & Sielcken, deponent learned that on or about the 25th day of October 1917 Sorenson and Nielsen, in ignorance of the death of said Hermann Sielcken, had subscribed, in the name of the firm, for $100,000 of First Liberty Bonds and had sent a check for $100,000 to Washington in connection with such subscription, and that in some way (deponent has never been able to learn just how) the Alien Property Custodian took this money and deposited either the money or the bonds so subscribed for in a

trust in his office, which he denominated as Trust No. 1; and in March 1921 the Columbia Trust Company filed with the Alien Property Custodian a claim for this $100,000, of which a copy is annexed to the Attorney General's moving papers as Exhibit K thereof, and shortly thereafter the brief application to amend the said claim, which is also part of said Exhibit K.

Deponent further says that in October 1919 Mrs. Clara Sielcken, the widow of said Hermann Sielcken, deceased, arrived in New York and took up her residence here; that she made an effort, as deponent was advised at the time, to have the Alien Property Custodian release from 1526
seizures he had made, not only some of her individual property but also her interest in the estate of said Hermann Sielcken which had been seized by the Alien Property Custodian in the hands of this executor, as per the said notice so served on the Columbia Trust Company on the 25th of October, 1918, Exhibit L hereof.

That deponent was informed at the time that some time in 1920 she had made a formal application to the Custodian for the return of such property of hers, and that the Custodian had insisted on her securing some record of the naturalization of Hermann Sielcken as an American citizen, and that she had brought an action in the 1527
Superior Court of California to re-establish the record of naturalization of said Hermann Sielcken, which it was claimed had been destroyed in the San Francisco fire and earthquake; that in that action the Alien Property Custodian had intervened and opposed the application, and that judgment was rendered in that suit re-establishing the record of the naturalization of said Hermann Sielcken. A copy of said judgment was delivered to the Trust Company early in 1921. A copy of said judgment is hereto annexed, marked Exhibit M, and hereby made a part of this affidavit.

That thereupon deponent, on behalf of the Trust Company, filed the claim, Exhibit K of the Attorney General's papers, and thereafter, on or about the 29th day of March, 1921 the Alien Property Custodian required of the Columbia Trust Company as such executor a re-

lease, as a condition of surrendering the property of the estate of Hermann Sielcken which he had seized.

In that connection deponent calls particular attention to the letter from F. J. Horn to the Columbia Trust Company of date June 3, 1918, pointing out how that $100,000 should be treated, a plan to which the Columbia Trust Company as executor acceded. Copy of such letter is hereto annexed as part of Exhibit K.

As against the said sum of $100,000, the Alien Property Custodian claimed charges of $5,648.70. Deponent
1529 submitted this claim to Mrs. Sielcken and she approved of the claim so made by the Custodian for such disbursements, and thereupon deponent executed the desired release and sent the same to the Alien Property Custodian. Annexed hereto and made a part hereof are copies of the release so executed; of the approval of Mrs. Sielcken of the deduction of the fees claimed by the Alien Property Custodian; of the statement of account of said Trust No. 1 rendered by the Alien Property Custodian; of the letter sent by deponent, enclosing such release, to the Alien Property Custodian; of the letter of April 14, 1921 enclosing the check for $94,351.30 to the Columbia Trust Company; of the letter of June 1, 1921 from the Assist-
1530 ant Trust Officer of the Columbia Trust Company, Mr. S. M. Spedon, to Mrs. Clara Sielcken, advising her that the amount of such check received from the Alien Property Custodian had been deposited to her personal credit, which are marked Exhibit N, and hereby made parts of this affidavit.

Deponent further says that, to wit, on the 3rd day of April, 1921, deponent, on behalf of said Columbia Trust Company as such executor received from the Alien Property Custodian the letter of April 2nd, 1921, of which a copy is hereto annexed, marked Exhibit O, and hereby made a part of this affidavit.

Deponent further says that in the year 1919 the Columbia Trust Company had filed its first account as executor of the estate of Hermann Sielcken, deceased, which showed all the transactions on the part of the executor and others in charge of the estate of Sielcken and of the

firm of Crossman & Sielcken from Sielcken's death up to the appointment of the Columbia Trust Company as executor, and a citation was duly issued to the Alien Property Custodian as a person claiming an interest in the estate to attend said account, and the said Alien Property Custodian appeared upon the said accounting in the Surrogate's Court and filed objections to certain payments made to Thorleif S. B. Nielsen and John S. Sorenson in settlement of their shares of the profits of Crossman & Sielcken, a settlement which had been made by express authority of the Alien Property Custodian in December 1917. 1532

Deponent is informed and believes that while that accounting was still pending the Alien Property took an appeal from the decree of the California Superior Court re-establishing the record of naturalization of said Hermann Sielcken. Said judgment was affirmed by the Appellate Court, and thereupon the Alien Property Custodian, with the approval of the Attorney General of the United States, on or about the 2nd day of April, 1921, surrendered all claim to the interest of Mrs. Clara Sielcken in the estate of said Hermann Sielcken and, as already stated, notified the Columbia Trust Company that it might make distribution out of the estate to Mrs. 1533 Sielcken as if no demand for her share of the estate had ever been made.

Shortly thereafter, the Alien Property Custodian by its attorney, Morgan M. Mann, Esq., formally withdrew his objection to the first account of the executor; and on July 7th, 1921 a decree approving the account of the Executor was duly entered in said Surrogate's Court for New York County, approving and settling such first account of the executor. A copy of such decree is hereto annexed, marked Exhibit P, and hereby made a part of this affidavit.

Deponent further says that the Irving Trust Company had nothing to do whatever with the application of Mrs. Sielcken Schwarz for the return of her property or her interest in the estate of Hermann Sielcken, deceased, and

1534 *Answering Affidavit of George E. Warren*

was an entire stranger to each of said proceedings except only as it received from the attorneys of said Clara Sielcken Schwarz a copy of the judgment of the California Court and the notice from the Alien Property Custodian that Mrs. Sielcken's interest in the estate of Hermann Sielcken, deceased, had been released by him with the approval of the Attorney General of the United States from the seizure he had previously made thereof, by virtue of the demand, Exhibit L hereto annexed.

1535 Deponent further says that on or about the 28th day of March, 1922 the Columbia Trust Company (now the Irving Trust Company) filed in the office of the Surrogate for New York County its account of its proceedings as executor from the 28th day of February 1919 (the date to which it had previously accounted by its first account) down to and including the 31st day of December, 1921. In that account the executor charged itself with $4,734,059.92 cash received, of which $309,195.12 was income, and credited itself with cash disbursed amounting to $4,406,495.28, leaving a balance of cash then in its hands of $327,564.64; and showing assets remaining on hand, including the said item of cash of $327,564.64, amounting in all to $2,290,439.26.

1536 That no claim against the Zentral Einkaufs-Gesellschaft m. b. H. was shown among the assets of the firm, either in the reports of Arthur Young & Company hereto annexed or in either the first or second account of the executor, nor did the return of said sum of $100,000 (less the sum of $5,648.70) returned by the Alien Property Custodian as above mentioned, appear in that account, because the said $100,000 was treated as a payment to Clara Sielcken Schwarz as residuary legatee and turned over to her as a distribution made during the period of the first account in which that payment appeared. This was done in accordance with the said suggestion of Mr. Horn of the Alien Property Custodian's office, Exhibit K hereof.

That the Alien Property Custodian was duly served with citation upon the said accounting, but failed to enter

any appearance upon the said accounting, and the said account was in all respects approved by decree of the Surrogate of date July 11, 1922. A copy of the final decree is hereto annexed, marked Exhibit Q, and hereby made a part of this affidavit.

In that second account the executor showed distribution of cash paid to legatees under the will of $1,549,425 to Clara Sielcken, $50,000 to John S. Sorenson and $50,000 to Thorleif S. B. Nielsen.

The said second account showed that the German Executors had executed an instrument, filed with the account, by which they had waived payment to themselves 1538
of the net estate in the hands of the American executor, as provided by the will, and had authorized and directed the American executor to pay direct to the residuary legatee and the legatees named in the Second, Fourth, and Fifth Articles of the Will, and that pursuant to that instrument payments to the residuary legatee had been made to her direct instead of to the foreign executors.

Said account further showed that the Josephinen Heim, the legatee named in the Fifth Article of the Will, had executed an instrument renouncing its legacy, which instrument was filed therewith, and that said legacy had fallen into the residuary estate.

The said account further showed that the Alien Property Custodian had served upon the executor a notice 1539
(Exhibit L above set forth), demanding the interest in the estate of the City of Baden Baden, Germany, and that the executor had not paid that legacy, but still held the same.

Said account further showed that the legacies given by the Third Article of the will had lapsed, as none of those legatees were in the employ of decedent on April 1, 1917.

Deponent further says that thereafter the City of Baden Baden failed to comply with the conditions of the bequest to it and, with the approval of the Alien Property Custodian, expressly renounced the same, and that the same lapsed and fell into the residuary estate by reason

1540 *Answering Affidavit of George E. Warren*

of the City of Baden Baden's failure to comply with the conditions of the legacy to it and its express renunciation thereof.

Said decree (Exhibit Q) was subsequently modified by decrees of December 16, 1922 and March 27, 1923 in regard only to features of said decree (Exhibit Q) restraining the distribution of further assets of the estate on account of pending litigation, which had meantime been settled and disposed of.

On or about the 30th day of January, 1925, the said Irving Trust Company (under its then name of Irving
1541 Bank-Columbia Trust Company) as executor of the will of said Sielcken, filed its third account of its proceedings as such executor of Hermann Sielcken, deceased, from the 31st day of December, 1921 down to and including the 14th day of January, 1925. By the said third account, it showed on hand a balance of assets of $304,753.67 (which included $93,109.99 of cash on hand), subject, however, to the executor's commissions, which were computed and adjudged and decreed to be $24,835.23 by the decree of the Surrogate approving and settling said account of the 9th day of February, 1925. And about three months thereafter this deponent ceased to be connected
1542 with the said executor and upon ceasing his connection with the Irving Trust Company, ceased to have anything to do with the administration of the estate of Hermann Sielcken, deceased.

During all the time that deponent was in charge of the administrator of the estate of said Hermann Sielcken and of the liquidation of the firm of Crossman & Sielcken neither deponent nor the said executor ever received any information of the existence of any claim either belonging to the said Sielcken or to the firm of Crossman & Sielcken against the Zentral Einkaufs Gesellschaft m. b. H., the above named defendant, and no mention of the existence of any such claim was made to deponent by any one connected with the firm of Crossman & Sielcken, nor was the existence of any such claim against the Zentral Einkaufs Gesellschaft shown anywhere on the books or in the files of the firm of Crossman & Sielcken, and

the existence of any such claim was entirely unknown to the executor.

Deponent further says that pursuant to the provisions of the will of said Hermann Sielcken, so admitted to probate by the Surrogate for New York County, the said Irving Trust Company as such executor employed John S. Sorenson and Thorleif S. B. Nielsen to assist it as far as possible in the liquidation of the firm affairs, paying them $1,000 apiece for their services as such assistants to the executor in liquidation of the firm, as had been directed by said Sielcken in his will.

1544

That in connection with such liquidation of the affairs of the said firm of Crossman & Sielcken deponent on behalf of the Columbia Trust Company (now Irving Trust Company) as such executor, sent to said Sorenson and said Nielsen on or about the 14th day of June, 1918, a letter, dated June 14, 1918, of which a true and correct copy is hereto annexed, marked Exhibit R, and hereby made a part of this affidavit.

Deponent further says that he never at any time had any other connection than as above stated with the bringing of the above entitled suit in the United States District Court by said Sorenson and Nielsen against the above named defendants, nor with the conduct of said suit in any way.

1545

I find in the files of the Executor two other letters of importance here:

1. Copy of a letter sent by me to Mr. Bower, the Manager of the Business Department of the Alien Property Custodian of date December 17th, 1917, of which copy is hereto annexed, marked Exhibit S, and hereby made a part of this affidavit.

2. An official letter from Mr. H. B. Caton, who was Director of the Bureau of Trusts of the Alien Property Custodian, to the Columbia Trust Company (now Irving Trust Company) of date April 1, 1921, which was received by me personally as Vice President in charge of the Sielcken estate on or about April 2nd, 1921, copy of

which is hereto annexed, marked Exhibit T, and is hereby made part of this affidavit.

Deponent further says that the proceeding by the Trust Company to recover the sum of $100,000 which had so come into the hands of the Alien Property Custodian, included in Trust No. 1, was wholly independent of the application made by Mrs. Sielcken to recover her interest in the property and was not predicated on any proceeding in connection with her application, but was presented entirely by deponent on behalf of the executor by the papers hereto annexed and the return of said
1547 $100,000 and of the release of any other claim that the Alien Property Custodian asserted to the estate of Hermann Sielcken, as shown by Exhibit K of the motion papers of the Attorney General and Exhibits N, N(1), N(2), N(3), N(4), N(5) and N(6), and O hereto annexed, was made without any reference to the claim Mrs. Sielcken had advanced in connection with her own application.

Deponent further says that at all times during his connection with the Columbia Trust Company, either under that name or its later names, the said corporation was a corporation duly organized and incorporated under the laws of the State of New York, and that at all said
1548 times its principal place of business was in the County of New York, in the State of New York.

G. E. WARREN.

Sworn to before me this
28th day of June, 1938.
James S. Ogsbury, Jr.
Notary Public.
Nassau Co., N. Y. No. 1870.
Certificate filed in N. Y. Co. No. 180.
N. Y. County Register's No. 0-0-105.
My Commission expires March 30, 1940.

1549

1550

Exhibit A Annexed to Answering Affidavit of George E. Warren.

Photostatic copy of Ledger account A. Mitchell Palmer, Custodian, for Crossman & Sielcken Liquidation investment account.

1551

TITLE OF TRU... (Est Herman Lillicker) Romine & Lillicker

NOW HELD

REMARKS

10420

DATE 3/10 Liquidated (Receipt)

COMMISSION

RECEIVED						DELIVERED						
						PAR VALUE	RATE	ANNUAL INCOME	INT. OR DIV. DUE	PRINCIPAL DUE		
		U.S. Liberty Loan Bonds				1000	3½			6/15/47		
Dec 7 1917	2	4th 1st 2nd 3rd	2 Bonds 1 Coupon		2							
		Note - Not out										
		Alexander Kerr	Cert Reg Stk				3	15	Semi Jan 1	1/1/18		
Dec 7 1917		4th & 1st Conv. 4th & 2nd		4500	1	May 5 1919	Sold Hallo & Illegible Co.		Strays	4500		
		Alexander Kerr	2nd Reg Stk				2		Semi Jan 2	1/1/18		
Dec 7 1917		4th & 1st Conv. 4th & 2nd		1000	1	May 5 1919	4th & 1st Conv. 4th & 2nd		Wallach Strays	1000		
May 2 1919		To Emma Wallach		500	1		To Hallo & Illegible			500		
				1500								
		Kansas City Gas Co.	1st Mtg				4	120	Jan	1/1/18		
				15000	1	Feb 6 1918	Sold		99.739	10000		
						Mar 27			.955	7000		
						25			.959	1000		
						May 8			.962½	2000		
							15000	G.J.L. Co	.1091	15000		
		Bethlehem Steel Co	Cert Temp Reg Dep 20 Yr				Coll	5	400	Jan	1/1/18	
Dec 7 1917		7% Pfd		5000	1	Dec 14 1917	Sold					
						20						
						21						
						26						
		Southern Pacific Co	1st Mtg				4	1000	Jan	1/1/18		
Dec 7 1917		4th & 1st Conv.		5000	1	Dec 28 1917	Sold					
						29						
						Jan 2 1918						
						7						
		City of Reg.	Coupon Stock				4½	10	Mar 5	1/1/18		
Dec 7 1917		7% Pfd		6000	1	Dec 19 1917	Sold					
		Colorado Industrial Co.	5% 20 Yr. Reg				5	100	Jan			
Dec 7 1917		2nd 1st		5000	1	Mar 19 1918	Sold	10000				
						19		7000				
						25		5000				
						Apr 1		5000				

10420

EXHIBIT A

EXHIBIT A, CONT'D.

[illegible] for Sherman & Sielcken in liquidation [illegible]

(Lost Sherman Sielcken)

COMMISSION

RECEIVED

DELIVERED

			PAR VALUE	RATE	ANNUAL INCOME	INT. OR DIV. DUE	PRINCIPAL DUE	BALANCE
[illegible] Greenwood Lake Ry Co. [illegible] Gold Bds.				5	105	[illegible]	5/1/46	
[illegible]	2100	Jan 7 1918	Sold			33.650	2100	2100
[illegible] Co. [illegible]				4	100	[illegible]	[illegible]	
[illegible]	[illegible]	Mar 20 1918	Sold			[illegible]	[illegible]	
[illegible] Det.				4	[illegible]	[illegible]	[illegible]	
[illegible]	[illegible]	[illegible] 1918	Sold			[illegible]		
[illegible]				[illegible]				
[illegible]								
[illegible]								
[illegible]								
[illegible] Co 3% [illegible]								
[illegible]								
[illegible] Certificates of Indebtedness				4				

1558

1559

Exhibit B Annexed to Answering Affidavit of George E. Warren.

Photostatic copy of first page of account carried in name Crossman & Sielcken in Liquidation Investment Account, Est. Herman Sielcken.

1560

Blank Page

TITLE OF TRUST Crossman & Sillcken in Liquidation — PAGE 371

HOW HELD (Est Herman Sillcken) Investment A/c — COMMISSION

REMARKS

RECEIVED										DELIVERED									
			U S A Certs of Indebtedness dep 4 E								PAR VALUE	RATE	ANNUAL INCOME	INT. DUE PAY.		PRINCIPAL DUE			
												4½				11/6/19			
Sept	26	1918	dep 4E 2 @ 500 1 @ 100 1 @ 50 1 @ 20 1 @ 10					Jan	16	1919	To F.R.B. for Redemption		1000	00				
			U S Certs of Indebtedness dep 4 E									4½				11/7/19			
Sept	27	1918	Cert 4½		31	1500	000	-	Dec	20	1918	To Fed Res Bk for Redemption		1771	30	1500	00		
			U S Victory L.L. 3½ %s									3½	3½% 3½%		Jan 6th	4920			
July	7	1921	11 1066					July	14	1921	Sold - C.J. Childs & Co					4939	50		
								July	21	1921	" " " "					6926	25		

1564 **Exhibit C Annexed to Answering Affidavit of George E. Warren.**

COLUMBIA TRUST COMPANY
SIXTY BROADWAY
NEW YORK

November 27, 1917.

Hermann Sielcken Estate.

Dear Sir:

1565 We have been unofficially advised of the death of Mr. Hermann Sielcken, and we are on notice of the fact he left a will naming the Columbia Trust Company as Executor. We have instituted an inquiry through the State Department to ascertain the truth of the report of Mr. Sielcken's death and meanwhile we write to you as representative of the Alien Property Custodian because we understand that you contemplate the immediate sale of the good will and investments of Mr. Sielcken.

We realize, of course, your anxiety to clean up matters of that sort, but in this case we must ask you to favor us with a short delay, at least in the matter of selling the investments; because if the report of Mr.
1566 Sielcken's death should be verified, we should be under the duty of offering the will for probate and doing everything proper to protect the corpus of the estate.

Yours faithfully,

(sgd) WILLARD V. KING
President.

Mr. J. A. Bower,
c/o Liberty National Bank,
120 Broadway,
New York City.

H.

Exhibit D Annexed to Answering Affidavit of George E. Warren. 1567

December 26, 1917.

Alien Property Custodian,
Business Department.
#111 Broadway,
New York City.

Attention of Mr. H. O. Kilbourn.

Dear Mr. Kilbourn:

Confirming our conversation with regard to the case 1568
of CROSSMAN & SIELCKEN, I write to advise that Columbia Trust Company has filed for probate the original Will of Hermann Sielcken in which Columbia Trust Company is named as Executor, a copy of the Will being enclosed herewith. Mr. Sielcken died on October 8th last in Baden Baden, Germany.

In order to expedite the settlement of the estate, we have also applied for temporary administration which may be issued to us within a day or two. In this connection, we would suggest that the Alien Property Custodian give his consent to the appointment of Columbia Trust Company as Executor, and to the turning over to 1569
the temporary administrator or executor of the assets belonging to the late Hermann Sielcken. If we are permitted to settle the estate, the firm of Crossman & Sielcken can be liquidated, we believe, with greater facility and can still be under the supervision of your Department.

We suggest that the executor be permitted to carry out the liquidation, bring the necessary transfer tax proceedings to determine the New York State tax on the estate and to determine the Federal estate tax. After the expiration of the statutory period for the filing of claims, which can be expedited by our advertising for a period of six months, the executor can account to the Surrogate's Court and ask for an Order to pay over to the Alien Property Custodian such part of the estate as may be found to be the property of alien enemies.

We believe that a liquidation of the affairs of Crossman & Sielcken by an executor would work more ad-

1570 *Exhibit D Annexed to Answering Affidavit of George E. Warren*

vantageously to all parties concerned, especially in view of the fact that it will determine exactly what part of the estate belongs to American citizens and what part of it belongs to alien enemies. It would also be greatly simplified if the executor could immediately take possession and liquidate the estate, using as a basis the figures prepared by Arthur Young & Company in their report for the Alien Property Custodian.

If this meets with your approval, upon our qualifying as temporary administrator or executor, we will ask you
1571 to authorize us to proceed to liquidate the estate in that capacity.

I should be glad to talk the matter over with your counsel if you care to have me do so.

Respectfully yours,

G. E. WARREN
Vice President.

P. S. I have just been informed that the Surrogate has signed the order appointing Columbia Trust Co. Temporary Adm. G. E. W.

1572

Exhibit E Annexed to Answering Affidavit of George E. Warren. 1573

CROSSMAN & SIELCKEN

Memorandum of Conference with Mr. Joseph A. Bower, representing Alien Property Custodian, Thursday, December 20th, 1917 at 11:20 A. M,

Mr. Bower in a conversation, approved of the following:

1st. That we accept the statement of Arthur Young & Company prepared as of September 30th for the purpose of settling the interest of the surviving partners in 1574
the earnings for the nine months, period ending on that day, and pay them accordingly.

2nd. That the several department heads who were receiving a percentage of earnings in addition to salary, be paid the amount due them, as shown by the statement of September 30th.

3rd. That the bonuses paid June 30th last to the employees in addition to their salaries, be paid for the six months' period ending December 30th.

Mr. Bower expressed his approval of our application for the appointment of an Executor, and also for our 1575
application as temporary Administrator.

G. E. WARREN

Vice-President

gew.dw

1576 **Exhibit F Annexed to Answering Affidavit of George E. Warren.**

In replying address only
The Alien Property Custodian
and Refer to No.

ALIEN PROPERTY CUSTODIAN
Sixteenth and P Streets NW.
Washington, D. C.

New York, January 14, 1918.

1577 CROSSMAN & SIELCKEN.

Mr. G. E. Warren, V. P.,
Columbia Trust Co.,
60 Broadway, N. Y. C.

Dear Sir:

I acknowledge receipt of a certificate evidencing your appointment as temporary administrator of the Estate of Herman Sielcken.

Under date of November 30, 1917, you were appointed my Agent for the purpose of supervising the liquidation
1578 of the interest of Herman Sielcken in the firm of Crossman & Sielcken under license ET-344, issued by the War Trade Board.

In view of the death of Mr. Sielcken, and your appointment as temporary administrator and nomination as executor of his will, you are hereby authorized as such temporary administrator, and executor when letters are issued to you, to take possession of all of the assets of the late Herman Sielcken as of October 8, 1917, the date of his death, and to account for them thereafter in due course of administration. In liquidating the interest of the late Herman Sielcken in the firm of Crossman & Sielcken you will, of course, pay the necessary expenses incident thereto and the debts owing by the firm, the estate being the sole owner thereof.

It will, however, be necessary for you to obtain a license from the War Trade Board authorizing you to

Exhibit H Annexed to Answering Affidavit of George E. Warren 1579

take over and manage the estate of said Sielcken as such administrator and executor.

A statement of the assets and liabilities of the firm of Crossman & Sielcken as of September 30, 1917, was prepared by Arthur Young & Co. under the direction of this Department which statement, for the purposes of liquidation, is satisfactory to this Department. This statement is to be continued down to October 8, 1917, the date of Mr. Sielcken's death, for the purpose of establishing the value of the estate taken over by you.

1580

The settlement made with the surviving partners, whose interest terminated upon the dissolution of the firm, is approved.

Yours very truly,

J. A. BOWER, Mgr.
Genl. Business Dept.

Exhibit G Annexed to Answering Affidavit of George E. Warren.

1581

This is a duplicate of the license printed herein as Exhibit E annexed to the affidavit of Vincent L. Banker (pages 287 to 288).

Exhibit H Annexed to Answering Affidavit of George E. Warren.

This is a duplicate of the license printed herein as Exhibit D annexed to the affidavit of Vincent L. Banker (pages 285 to 286).

1582 **Exhibit I Annexed to Answering Affidavit of George E. Warren.**

CROSSMAN AND SIELCKEN

REPORT

SUBMITTING

FINAL BALANCE SHEET AS AT SEPTEMBER 30, 1917

1583 AND

INCOME ACCOUNT

FOR THE NINE MONTHS ENDING SEPTEMBER 30, 1917

ARTHUR YOUNG & COMPANY
Accontants and Auditors
New York City

ARTHUR YOUNG & COMPANY
1584 Accountants and Auditors

New York Partners
Arthur Young, C. P. A. (Ill)
William Sutherland C. P. A. (Wis)
A. J. Baxter F. C. A. C. P. A. (NY)
L. J. Nolan C. P. A. (Conn)
D. D. F. Mackenzie C. A. C. P. A. (Ill)

Chicago-105 So. LaSalle Street
New York-71 Broadway
Kansas City-1106 Commerce Building
Milwaukee-1503 First National Bank Building
Cable Address Arthyoung

71 Broadway, (Empire Building)
New York December 13, 1917.

Messrs. Crossman and Sielcken,
90 Wall Street,
New York, N. Y.

Exhibit I Annexed to Answering Affidavit of George E. Warren 1585

Dear Sirs:

We have examined the books and records of the firm of Crossman and Sielcken and have prepared therefrom the accompanying final statements of assets and Liabilities as at September 30, 1917 and Operating and Profit and Loss Account for the nine months ended that date. These statements are supported by the revised schedules numbered I-XI. submitted herewith.

The following condensed statement shows the differences between the tentative and final Balance Sheets at September 30, 1917: 1586

Assets	Tentative Balance Sheet	Final Balance Sheet	Increase Decrease	
Current Assets:				
Cash	$ 277,473.72	$ 277,473.72	———	
Marketable Securities	504,260.75	504,260.75	———	
Collateral Loans Receivable	1,497,966.99	1,444,724.17	53,242.82	
Notes Receivable	348,154.68	348,154.68	———	1587
Accounts Receivable	1,824,330.94	1,934,227.97	109,897.03	
Inventories	215,696.26	208,206.35	7,489.91	
Total Current Assets	$4,667.883.34	$4,717,047.64	$ 49,164.30	
Due from Concerns in Enemy Countries	510,340.35	664,167.03	153,826.68	
Stocks and Bonds	1,125,127.72	1,114,112.76	11,014.96	
Copenhagen Shipments in Prize Courts	480,413.93	———	480,413.93	
Deferred Charges	61,321.45	———	61,321.45	
Total Assets	$6,845,086.79	$6,495,327.43	$349,759.36	

Exhibit I Annexed to Answering Affidavit of George E. Warren

Liabilities	Tentative Balance Sheet	Final Balance Sheet	Increase Decrease
Current Liabilities:			
Loans and Notes Payable	$ 710,000.00	$ 710,000.00	———
Accounts payable	176,095.16	167,296.19	8,798.97
Total Current Liabilities	$ 886,095.16	$ 877,296.19	8,798.97
Due to Concerns in Enemy Countries	75,534.47	33,249.71	42,284.76
Reserves:			
Loss on Prize Court Shipments	480,413.93	———	480,413.93
Excess Profits Tax	58,724.00	40,012.00	18,712.00
Total Liabilities	$1,500,767.56	$ 950,557.90	$550,209.66
Net worth (Excluding Goodwill)	$5,344,319.23	$5,544,769.53	$200,450.30
Divisible as under:			
Herman Sielcken	$5,271,889.95	$5,409,967.22	$138,077.27
Thorleif Nielsen	39,589.00	70,918.10	31,329.10
John Sorenson	32,840,28	63,884.21	31,043.93
	$5,344,319.23	$5,544,769.53	$200,450.30

Exhibit I Annexed to Answering Affidavit of George E. Warren 1591

We have the following comments to make on the changes as shown in the above statement.

ASSETS

Collateral Loans Receivable Decrease $53,242.82

This decrease is due to a sale of rubber on account of Paul Hilken. This sale was made prior to September 30, 1917, but the account sales was not rendered till late in October.

1592

Accounts Receivable Increase $109,897.03

This is composed of commission and interest charges which could not readily be assessed at date of our tentative report.

Inventories Decrease $7,489.91

This is due to a delivery of nitrates to the United States Army which was not billed till after our preliminary figures were submitted.

Due from Concerns in Enemy Countries 1593 Increase $153,826.68

This increase is accounted for by a charge to Theodor Wille of Hamburg, Germany of his proportion of the loss on shipments of foodstuffs to Copenhagen which shipments were commandeered by the British Admiralty. Complete details of these shipments were given in our previous report.

Stocks and Bonds Decrease $11,014.96

This decrease is due to the fact that the firm was obligated to sell back to the United States Lloyds the two certificates held by them at the price fixed by that Company.

Deferred Charges Decrease $61,321.45

These charges have either been written off to Profit and Loss or charged against Accounts Receivable depending on the nature of each item.

1594 *Exhibit I Annexed to Answering Affidavit of George E. Warren*

LIABILITIES

Accounts Payable Decrease $ 8,798.97

Due to Concerns in Enemy Countries Decrease $42,284.76

These decreases are accounted for by commission charges etc., which could not be put on the books at date of our last examination.

Reserve for Loss on Prize Court Shipments Decrease $480,413.93

1595

The losses on the shipments in the British Prize Court having now been ascertained and apportioned between Theodor Wille and Crossman and Sielcken, the reserve for these losses is no longer necessary. The firm's proportion of the loss has been charged against the reserve and the balance over reserved against this loss credited to Profit and Loss Account.

Reserve for Excess Profits Tax Decrease $18,712.00

We have reduced this figure by eliminating the net income tax figure which will have to be paid by the partners distinct from the business.

1596

Net Worth Increase $200,450.30

The increase of $200,450.30 in the Net Worth for the period is due primarily to the writing back to Profit and Loss of $127,634.80 being the amount over reserved for loss on shipments held in the British Prize Court. This amount had previously been charged against profits pending the final decision of the British Prize Court. The balance $72,815.50 consists of interest on Accounts Receivable and commissions on account Sales. These figures were not available at the time the tentative statements were prepared.

Yours very truly,

ARTHUR YOUNG & CO.

CROSSMAN & SIELCKEN in Liqn.
By Thorleif S. B. Nielsen

Exhibit I Annexed to Answering Affidavit of George E. Warren 1597

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CROSSMAN & SIELCKEN
in Liqn.
By THORLEIF S. B. NIELSEN

Exhibit I Annexed to Answering Affidavit of George E. Warren

BALANCE SHEET

September 30, 1917

ASSETS

CURRENT ASSETS:		
Cash on Hand and in Banks (Schedule I)		277,473.72
Marketable Securities (Schedule II)		504,260.75
Collateral Loans Receivable (Schedule III)		1,444,724.17
Notes Receivable (Schedule IV)		348,154.68
Accounts Receivable (Schedule V):		
Due from Domestic, Allied and Neutral Concerns	$1,939,496.95	
Less: Reserve for Doubtful Accounts	5,268.98	1,934,227.97
Inventories (Schedule VI)		208,206.35
Total Current Assets		$4,717,047.64
DUE FROM CONCERNS IN ENEMY COUNTRIES (Schedule V)		884,167.03
STOCKS AND BONDS (Schedule VII)		1,114,112.76
		$6,495,327.43

LIABILITIES AND CAPITAL

CURRENT LIABILITIES:		
Loans and Notes Payable (Schedule VIII)		$ 710,000.00
Accounts Payable (Schedule IX):		
Due to Domestic, Allied and Neutral Concerns		167,296.19
Total Current Liabilities		$ 877,296.19
DUE TO CONCERNS IN ENEMY COUNTRIES (Schedule IX)		33,249.71
RESERVES:		
For Excess Profits Tax (Schedule X)		40,012.00
PARTNERS' ACCOUNTS (Schedule XI):		
Herman Sielcken	$5,409,967.22	
Thorleif Nielsen	70,918.10	
John Sorenson	63,884.21	5,544,769.53
		$6,495,327.43

CROSSMAN & SIELCKEN in Liqn.
By. THORLEIF S. B. NIELSEN

Exhibit I Annexed to Answering Affidavit of George E. Warren 1603

PROFIT AND LOSS ACCOUNT FOR NINE MONTHS ENDED SEPTEMBER 30, 1917

GROSS INCOME:		
General Commissions	$355,125.82	
Commissions on Exports	97,011.87	
Commissions on Imports	42,548.99	
Interest	275,927.99	$ 770,614.67
		1604
Deduct:		
Administrative & General Expenses		100,428.53
Net Income		$ 670,186.14
Add:		
Appreciation less depreciation in values of Investments	$411,420.63	
Proportion of Loss on Prize Court shipments borne by Theodor Wille-Hamburg, Germany	127,634.18	1605
Appreciation in value of Exchange Memberships	8,325.00	547,379.81
		$1,217,565.95
Deduct:		
Other Charges:		
Provision for Excess Profits Tax	$ 40,012.00	
Interest on Herman Sielcken's Capital Account	211,759.74	251,771.74
Net Profit for Period		$ 965,794.21

1606 *Exhibit I Annexed to Answering Affidavit of George E. Warren*

Divisible as follows:

Herman Sielcken		
75%	$724,345.65	
Thorlief Nielsen		
12 1/2%	120,724.28	
John Sorenson		
12 1/2%	120,724.28	965,794.21

1607 CROSSMAN & SIELCKEN in Liqn.
By THORLEIF S. B. NIELSEN

Schedule I.

CASH IN BANKS AND ON HAND—SEPTEMBER 30, 1917

CASH IN BANKS:

Equitable Trust Company	$ 27,216.33	
National City Bank	25,874.87	
Chase National Bank	4,651.18	
Guaranty Trust Company	11,489.47	
1608 Corn Exchange Bank	3,561.19	
Hanover National Bank	110,794.64	
Columbia Trust Company	89,386.04	
		$272,973.72

CASH ON HAND:

Notes	$3,526.00		
Coin	13.22	$ 3,539.22	
Vouchers:			
John Sorenson	$ 700.43		
M. Watkins	5.35		
A. Peiser	65.00		
Mrs. Blackwell	40.00		
Sundries $2 Drawer	150.00	960.78	4,500.00
Total, carried to Balance Sheet, Exhibit A			$277,473.72

CROSSMAN & SIELCKEN in Liqn.
By THORLEIF S. B. NIELSEN

Exhibit I Annexed to Answering Affidavit of George E. Warren

1609

SCHEDULE II.

MARKETABLE SECURITIES—SEPTEMBER 30, 1917

Number Held	Name of Company	Par Value	Cost		Present Market or Book Value	
BONDS						
6	New York City 4 1/2s due 1962	1000	$ 6,015.00		$ 5,917.50	
35	Kansas City Terminal Railway 4s due 1960	1000	33,250.00		28,656.25	
42	Colorado Industrial Company 5s due 1934	1000	31,500.00		32,550.00	
25	Southern Pacific Refunding 4s due 1955	1000	23,737.50		21,062.50	
46	New York Central Debenture 4s due 1934	1000	41,084.50		37,720.00	
30	United States Liberty Bonds 3 1/2s	1000	30,000.00	$165,587.00	30,000.00	$155,906.25
STOCKS						
20	American Sugar Refining Company	100	$ 2,240.00		$ 2,225.00	
1000	Brooklyn Union Gas Company	100	145,125.00		100,000.00	
642	Columbia Trust Company	100	127,422.20		----	
200	do Benefit Certificates	--	3,500.00		189,180.00	
144	General Development Company	25	1,905.12		5,472.00	
200	Kansas City Southern Railroad Company, Preferred	100	13,064.47		10,425.00	
300	do Common	100	11,934.50		5,437.50	
300	Lawyers Title Insurance and Trust Company	100	93,750.00		30,300.00	
100	Miami Copper Company	5	2,250.00		3,425.00	
5	Pittsburgh Plate Glass Company, Common	100	500.00		500.00	
	Atlantic Mutual Insurance Company, Scrip	--	1,390.00	403,081.29	1,390.00	343,354.50
				$568,668.29		
	TOTAL, carried to Balance Sheet, Exhibit A					$504,260.75

1610

CROSSMAN & SIELCKEN
in Liqn.
By THORLEIF S. B. NIELSEN

1611

1612

Exhibit I Annexed to Answering Affidavit of George E. Warren

SCHEDULE III

COLLATERAL LOANS RECEIVABLE SEPTEMBER 30, 1917

Name	Location	Nature of Collateral Held	Value of Collateral	Indebtedness	Remarks
Paul G. L. Hilken	Baltimore, Md.	Rubber stored in Warehouses	$ 875,001.70	$ 776,232.01	Value of collateral taken at market value
A. Heussler	do	Coffee stored in Warehouses	115,911.45	127,795.94	Value of collateral taken at appraisal value
Louis Seitz	do	do	47,127.55	47,127.55	Certificate of transfer equal to loan. Market value of collateral in excess.
Mitchell Bros.	do	do	268,559.70	260,363.49	Value of collateral taken at market value
S. D. Stanatopulo	do	do	20,286.67	20,286.67	Certificate of transfer equal to loan Market value of collateral in excess
J. D. Pickslay	do	Fidelity and Phoenix Insurance Company Stock Certificates	2,000.00	2,316.29	
1613 G. Rohrecke	do	Miami Copper Company and Atchison Topeka & Santa Fe Stock Certificates	16,000.00	10,547.05	Stock taken at market value
J. W. Koehrman	Toledo, Ohio	The Woolson Spice Company Stock Certificates	55,000.00	32,045.13	Stock taken at $1,100 per share (present net worth)
F. H. Biggs	do	do	27,500.00	16,022.57	do do
T. Nielsen	New York City	do	27,500.00	15,984.64	do do
J. S. Sorenson	do	do	27,500.00	15,984.64	do do
Frank A. Vanderlip	do	do	55,000.00	32,018.19	do do
W. Shotten Coffee Company	St. Louis, Mo.	Real Estate and Insurance Policies	61,000.00	88,000.00	Appraisal value for Real Estate. Insurance policies taken at cash surrender value.
			$1,618,387.07		
			1,444,724.17		
			$ 173,662.90		Excess collateral over Loans
	TOTAL, carried to Balance Sheet, Exhibit A			$1,444,724.17	

1614 Of the above Loans S. D. Stanatopulo, Frank A. Vanderlip and Louis Seitz have since been entirely paid up.

in Liqn.
CROSSMAN & SIELCKEN

By THORLEIF S. B. NIELSEN

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Exhibit I Annexed to Answering Affidavit of George E. Warren

NOTES RECEIVABLE—SEPTEMBER 30, 1917

Maker	Demand	Due Date	Amount	
AMERICAN:				
G. S. Kutz	$1,900.00			
The City Hall Realty Co.		June 20, 1918	$ 7,000.00	
do		June 20, 1919	7,000.00	
do		June 20, 1920	7,000.00	
do		June 20, 1921	7,000.00	
do		June 20, 1922	72,000.00	$100,000.00
The Heekin Can Company		Jan. 7, 1918	$ 25,000.00	
do		Jan. 14, 1918	25,000.00	
do		Jan. 21, 1918	25,000.00	
do		Jan. 28, 1918	25,000.00	
do		Feb. 4, 1918	25,000.00	
do		Feb. 11, 1918	25,000.00	
do		Feb. 18, 1918	25,000.00	
do		Feb. 25, 1918	25,000.00	200,000.00
F. I. DuPont de Nemours & Co.		Oct. 8, 1917	$ 2,380.00	
do		Oct. 19, 1917	1,288.52	
do		Oct. 19, 1917	8,600.00	12,268.52
Braunling Coffee Company		Nov. 5, 1917		250.00
National City Bank of New York		Dec. 18, 1917		1,792.14
Pickslay, J. D.	2,300.00			
	$4,200.00			$314,310.66

1618 *Exhibit I Annexed to Answering Affidavit of George E. Warren*

DUE FROM CONCERNS IN NEUTRAL AND ALLIED COUNTRIES:			
Vorwerk & Company, Valparaiso	Oct. 31, 1917	$ 3,191.25	
Thomas Drysdale & Co., Buenos Aires	Nov. 25, 1917	20,000.00	
London and Brazilian Bank, Ltd., London	Dec. 5, 1917	4,578.77	
Edward Schluter & Co., London	Dec. 10, 1917	1,874.00	$ 29,644.02

1619

SUMMARY

Demand Notes Receivable		$ 4,200.00
Time Notes Receivable:		
Concerns in the United States	$314,310.66	
Concerns in Neutral and Allied Countries	29,644.02	343,954.68
Total, Carried to Balance Sheet, Exhibit A		$348,154.68

1620 CROSSMAN & SIELCKEN in Liqn.
By THORLEIF S. B. NIELSEN

Exhibit 1 Annexed to Answering Affidavit of George E. Warren 1621

ACCOUNTS RECEIVABLE—SEPTEMBER 30, 1917

DUE FROM CONCERNS IN NEUTRAL AND ALLIED COUNTRIES:

J. G. Aranjo	Manaos, Brazil	$ 43,251.25	
A. Monrao & Company	Para, "	9,283.31	
Bromberg & Company	Porto Allegri, Brazil	8,709.19	
Thos. Drysdale & Company	Buenos Aires, Argentina	32,615.49	
Franklin Veras & Company	Parnahyba, Brazil	477.66	
Fonck & Company	Valparaiso, Chili	486.25	1622
Hime & Company	Rio de Janeiro, Brazil	17.00	
Guinle & Company	Rio de Janeiro, Brazil	47,459.85	
Gustav Graeff	Para, Brazil	2,438.11	
John Lumsden	Valparaiso, Chili	27.98	
H. Theo Muller	Porto Allegri, Brazil	5,924.64	
Leite Jr. & Company	Para, Brazil	716.09	
Leonel de Carvalho	Rio de Janeiro, Brazil	50.23	
Louis Hermanny & Company	Rio de Janeiro, Brazil	88,380.88	
Merrelles & Company	Marahan, Brazil	1,280.31	
Pires Franco & Company.	Para, Brazil	1,949.89	
Rieckmann & Company	Sao Paulo, Brazil	26,775.87	
Ricardo Schulz & Company	Valparaiso, Chili	11,059.03	
Robert Pusterla & Company	Buenos Aires, Argentina	13,523.05	1623
Semper & Company	Manaos, Brazil	1,212.17	
Stubenrauch & Company	Punta Arenas, Patagonia	3,951.85	
Vorwerk & Company	Valparaiso, Chili	28,856.37	
Jose Novita & Amado	Sao Paulo, Brazil	7,164.75	
Mostardeira Irmao	Rio de Janeiro, Brazil	3.58	
Piza, Piza & Company	Panama, Panama	330.81	
Bianchi & Hamres	Rio de Janeiro, Brazil	11.05	
Jorge, Barry & Hermanes	Buenos Aires, Argentina	17.72	
Hermann Lundgren	Pernambuco, Brazil	39.09	
Ferreira Costa & Company	Para, Brazil	11.05	
Ferreira Comes & Company	Para, Brazil	7.76	
Cereija & Company	Montevideo, Uraguay	1,263.08	
Richard Lodders	Para, Brazil	34.75	
Guerin & Company	Montevideo, Uraguay	534.73	
Ferreira & Irmar	Maranhan, Brazil	115.39	
R. F. G. Jaacke	Buenos Aires, Argentina	25.73	
Salvo Camponias & Company	Montevideo, Uraguay	1,038.85	

Exhibit I. Annexed to Answering Affidavit of George E. Warren

	A. Lisboa & Company	Rio de Janeiro, Brazil	16.15
	Pereira Mattos & Company	Maranhan, Brazil	356.38
	Ferreira de Oliveira & Sobrinho	Para, Brazil	190.56
	Eugenio Barth & Company	Montevideo, Uraguay	3.95
	Arzeno & Daruspe	Buenos Aires, Argentina	1,298.67
	Ramon Jove	Barcelona, Spain	5.33
	Barrera & Company	Havana, Cuba	78.60
	A. Acosta & Company	Havana, Cuba	112.50
1625	Broqua & Schollberg	Montevideo, Uraguay	519.07
	Anezin Hermanos & Company	Buenos Aires, Argentina	13.48
	Juan Marabotto & Company	Montevideo, Uraguay	183.65
	Escola de Fugenharria	Bahia, Brazil	8.20
	Cia Argentina Instrumental Cientifico	Buenos Aires, Argentina	12.48
	Dr. Joas Noronha Santos	Bahia, Brazil	5.25
	Eduardo Germain	Valparaiso, Chili	908.60
	Jacob Walter & Company	London and Rio de Janeiro	1,040.00
	Bromberg & Company	Porto Allegri, Brazil	341.97
	Warburg & Goldschmidt	Buenos Aires, Argentina	585.88
		Carried Forward	$344,725.53

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CROSSMAN & SIELCKEN in Liqn.
By THORLEIF S. B. NIELSEN

Exhibit I Annexed to Answering Affidavit of George E. Warren 1627

ACCOUNTS RECEIVABLE—SEPTEMBER 30, 1917 (Cont'd).

Due From Concerns in Neutral and Allied Countries (Cont'd):

	Brought Forward	$344,725.53	
A. A. Barhati & Company	Naples, Italy	18.00	
A. F. DeSouza & Company	Para, Brazil	111.29	
Banco de Columbia	Bogota, Columbia	6.00	1628
Lewers & Cooke, Ltd.	Honolulu, H. I.	11,846.25	
Honolulu Rapid Transit & Land Company	Honolulu, H. I.	21,355.79	
Milton E. Springer & Company	Manila, P. I.	10.53	
Wm. Rummell	Sydney, Australia	129.97	
J. H. Butler & Company	Melbourne, Australia	37.65	
John Danks & Sons	Melbourne, Australia	398.98	
Commonwealth Typewriter Exchange	Melbourne, Australia	166.60	
Scott & Underwood	Sydney, Australia	23.91	
Chas. Davis	Hobart, Tasmania	786.39	
Noyes Bros.	Sydney, Australia	1,075.73	1629
Phillip Bros.	Cape Town, South Africa	206.30	
Scott Bros.	Cape Town, South Africa	66.92	
Phillip Bros.	Port Elizabeth, South Africa	22.49	
Atkinson & Son	Durban, South Africa	55.77	
Blagden & Company	London	186.09	
Wm. Dunn & Company	London	128.00	
Hodgson, Hay & Company	Port Elizabeth, So. Africa	77.50	
Carthy & Cooke, Ltd.	Honolulu, H. I.	3.00	
McLean & Archibald	Wellington, New Zealand	83.63	
Antonio Ribeiro	Beira, South Africa	113.80	
D. Freckel, Ltd.	London	50.79	
Arbuckle Bros.	New York	399.91	
Levering Coffee Company	Baltimore, Md.	416,255.77	
Williams Russel & Company	New York	286.44	
" " "	New York	12,902.99	
Alzamora Palazio & Company		32.12	
Export Rebuilt Typewriter Co.		1,000.00	

1630 *Exhibit I Annexed to Answering Affidavit of George E. Warren*

National Carbon Company		2,200.00
J. Avon & Company	New York	213.58
Bennett Day & Company	"	334.00
Eppens Smith Company	"	30,911.40
Estate of James Everard	"	40.89
Frederick M. Genung	"	2,936.85
Panama S. S. Company	"	209.02
Smith, Kirkpatrick & Company		105.45
1631 Waldorf Astoria Hotel Company New York		10,595.18
Johnson Layn Coffee Company		1.55
United States Army		23,172.82
United States Navy		9,982.38
Montgomery, Ward & Company		2,048.15
Jones Hukin Company		23,794.65
Booth & Company		190.00
John O'Donohue's Sons		42.30
Russell & Company		702.54
H. B. Hollins & Company		10,592.11
1632 Walter F. Blake		15,438.71
Wm. S. Scull & Company		1,367.06
John S. Sills & Son		692.62
S. D. Stanatopulo		308.70
Carried Forward		$948,443.10

CROSSMAN & SIELCKEN in Liqn.
By THORLEIF S. B. NIELSEN

Mitchell Bros.	5,092.37
Sprague, Warner & Company	3,622.87
Widlar & Company	2,177.45
Sundry Debtors	17,485.54
Woolson Spice Company	21,428.04
Estate of Geo. C. Boldt	375,615.45
Total Neutral and Allied Countries	$1,373,864.82

Exhibit I Annexed to Answering Affidavit of George E. Warren 1633

FOREIGN DRAFTS SENT OUT FOR COLLECTION:

Berringer & Company	Para, Brazil	$ 4,913.35	
Banco Nacional Ultramarino	" "	24,166.86	
Banco Aleman Trans-atlantico	" "	449.80	
Banco de Para	" "	48,235.12	
Banco de La Nacion Argentina	Buenos Aires, Argentina	2,019.00	
Brazilianische Bank fur Deutschland	Bahia, Brazil	123,469.25	
Banco de Brazil	Para, Brazil	1,947.56	1634
Moreira Gomes & Company	" "	452.23	
Marc Jacob	Manaos, Brazil	126.16	
Deutsche Sud Amerika Bank	" "	1,612.36	
Francisco Aguiar & Company	Maranhan, Brazil	11,559.46	
Agencia Gomes	" "	1,999.37	
International Banking Corporation	New York	658.19	
National City Bank	New York	182,841.84	
J. Henry Schroder & Company	London	152.68	
Kleinworth Sons & Company	London	4,210.83	1635
Danske Landsmans Bank		2,680.09	
Colonial Bank	New York	2,047.01	
Total Foreign Drafts sent out for Collection		$423,541.16	

MISCELLANEOUS ACCOUNTS RECEIVABLE:

Transportation Insurance	$ 137.50	
Employees Accounts	2,690.00	
Government of Sao Paulo	89,606.09	
Special Interest Account	9,501.18	
J. Henry Schroder & Company	Sao Paulo Treasury Bills	15,240.89
Kleinworth Sons & Company	" " " "	2,511.96
Sorenson & Neilsen		22,403.35
Total Miscellaneous Accounts Receivable	$142,090.97	
TOTAL, Carried to Balance Sheet, Exhibit A	$1,939,496.95	

CROSSMAN & SIELCKEN in Liqn.
By— THORLEIF S. B. NIELSEN

DUE FROM CONCERNS IN ENEMY COUNTRIES:

Siegmund Robinow & Sohn	Hamburg, Germany	$ 74.55
Theodor Wille	Hamburg, Germany	403,033.72
Ohliger & Company	Manaos, Brazil	5,850.68
Perinam Ziegler & Company	Hamburg, Germany	175,000.00
L. Behrens & Sohn	Hamburg, Germany	320.23
H. Diedricksen & Company	Hamburg, Germany	79,887.85
TOTAL, Carried to Balance Sheet, Exhibit A		$664,167.03

1637

Note:—

360 shares of the Woolson Spice Company Common Stock are held in trust by Crossman and Sielcken for Theodor Wille, Hamburg. The certificates of stock are in name of Hermann Sielcken.

CROSSMAN & SIELCKEN in Liqn.
By— THORLEIF S. B. NIELSEN

INVENTORY — SEPTEMBER 30, 1917

EXPORT MERCHANDISE

1638

Goods on hand purchased by Crossman and Sielcken for which no export permit was allowed	$191,376.94	
Insurance and Storage Charges Applicable	644.77	$190,732.17
COFFEE		
1,290 Bags on Hand—		
166,023 lbs. at 10c per lb.	$ 16,602.30	
10,709 lbs. at 8⅜c per lb.	896.88	
	$ 17,499.18	
Less:		
2% Discount	350.00	17,149.18
POSTAGE AND STATIONERY		325.00
TOTAL, carried to Balance Sheet, Exhibit A		$208,206.35

CROSSMAN & SIELCKEN in Liqn.
By— THORLEIF S. B. NIELSEN

Exhibit I Annexed to Answering Affidavit of George E. Warren 1639

INVENTORY CERTIFICATE

New York, Dec. 5, 1917.

We, JOHN S. SORENSON and THORLEIF S. B. Nielsen, hereby certify that the merchandise on hand September 30, 1917, paid for by Crossman and Sielcken and not charged to clients, was as follows:

Export Merchandise	$190,732.17
Coffee	17,149.18
Postage and Stationery	325.00
	$208,206.35

1640

1. The above figures were compiled either by us or under our instructions.

2. The quantity of coffee has been determined by actual weight.

3. The stock on hand is stated at cost to Crossman and Sielcken, less all trade and cash discounts.

4. All the goods are in good salable condition. 1641

5. That in our opinion the amount stated above is a fair and proper valuation of the said stock.

6. That all stock has been paid for by Crossman and Sielcken and has not yet been charged to clients.

7. That there is no hypothecation or lien on any of the above.

The coffee has been taken into inventory at the market price, the same being much lower than the actual cost.

Postage and stationery have been taken into inventory at an estimate by.

(Signed) JOHN S. SORENSON
(Signed) THORLEIF S. B. NIELSEN
CROSSMAN & SIELCKEN, in Liqn.
By THORLEIF S. B. NIELSEN

Exhibit I Annexed to Answering Affidavit of George E. Warren

Schedule VII

STOCKS AND BONDS — **September 30, 1917**

Number Held	Name of Company	Par Value	Cost		Present Market or Book Value	
STOCKS						
50	American District Telegraph Company of Brooklyn	$ 25	$ 1,250.00		$ 500.00	
50	First Re-Insurance Company of Hartford	100	10,000.00		10,000.00	
35	Lincoln National Bank of Pittsburgh	100	8,750.00		4,375.00	
5	Mercantile Insurance Company of America	100	750.00		750.00	
50	Pittsburgh Plate Glass Company, Preferred	100	12,500.00		12,500.00	
300	Sao Paulo Coffee Estates	—	6,251.64		6,251.64	
1000	Wm. Shotten Coffee Company, Preferred	100	100,000.00		100,000.00	
36¼	Sheffield Coal and Iron Company, Preferred)					
364	do Common -)					
5	do 1st Mortgage 5% Bonds)		8,261.25		4,130.62	
2	United States Lloyds Certificates		7,600.00		8,000.00	
824	The Woolson Spice Company		413,950.00	569,312.89	906,400.00	$1,052,907.26
BONDS						
50	Bethlehem Steel Company 5% Bonds due 1936	1000	$ 50,287.50		$ 43,000.00	
60	Deutscher Verein 1st Mortgage Bonds 2% and 3%	100	2,700.00		2,700.00	
5	Kansas City, Shreveport and Gulf Terminal Company 4% Bonds due 1927	2 at 1000	1,630.00		1,250.00	
3	New York and Greenwood Lake Railway 5% Bonds due 1946	1 at 100	2,104.20	56,721.70	2,005.50	48,955.50
EXCHANGE MEMBERSHIPS						
2	Chicago Coffee Exchange Memberships)					
1	Chicago Board of Trade ")					12,250.00
				$626,034.59		
TOTAL, carried to Balance Sheet, Exhibit A						$1,114,112.76

CROSSMAN & SIELCKEN, in Liqn.
By THORLEIF S. B. NIELSEN

Exhibit I Annexed to Answering Affidavit of George E. Warren 1645

Schedule VIII

LOANS AND NOTES PAYABLE—SEPTEMBER 30, 1917

	Due Date	*Collateral*	*Amount*	
LOANS:				
Goldman, Sachs & Co.	Oct. 19 1917	Rubber	$ 50,000.00	
do	do	do	50,000.00	
Philadelphia National Bank	Dec. 17, 1917	do	50,000.00	1646
do	do	do	50,000.00	
do	do	do	50,000.00	
do	do	do	50,000.00	
do	do	do	50,000.00	
do	do	do	50,000.00	
National City Bank	Dec. 23, 1917	do	50,000.00	
do	do	do	50,000.00	
do	do	do	50,000.00	
do	do	do	50,000.00	
do	do	do	50,000.00	
do	do	do	50,000.00	
			$700,000.00	1647
NOTES:				
Vorwerk & Co.	Oct. 22, 1917		$ 4,058.12	
do	Nov. 23, 1917		5,941.88	
			$ 10,000.00	
TOTAL, carried to Balance Sheet, Exhibit A			$710,000.00	

CROSSMAN & SIELCKEN, in Liqn.
By THORLEIF S. B. NIELSEN

1648 *Exhibit I Annexed to Answering Affidavit of George E. Warren*

Schedule IX

ACCOUNTS PAYABLE—SEPTEMBER 30, 1917

Due to Concerns in Neutral and Allied Countries:

	R. G. Clinckett	Bridgetown, Barbadoes	$ 82.52
	Allen & Robinson, Ltd.	Honolulu, H. I.	3,758.83
	F. Norman Roach & Company	Bridgetown, Barbadoes	15.78
1649	Cunha & Company	Maranhan, Brazil	5,289.70
	Agencia Gomes	Para, Brazil	604.30
	Augusta Vallega	Montevideo, Uruguay	1,974.59
	Francisco Aguiar & Company	Maranhan, Brazil	571.85
	Besa & Company	Valparaiso, Chili	43.09
	Jeronymo Cardozo Botelho	Para, Brazil	1,386.70
	Lahusen & Company	Buenos Aires, Argentina	2,225.19
	Moreiva, Gomes & Company	Para, Brazil	744.33
	A. M. Slach	Buenos Aires, Argentina	478.22
	Unias de Ferros (Bromberg Dandt & Company)	Port Allegri, Brazil	38.45
	Leopoldino Ry. Company, Ltd.	Rio de Janeiro, Brazil	8,207.32
1650	Ernesto Torniquist & Company	Buenos Aires, Argentina	61.86
	A. Carvalhaes	Manaos, Brazil	45.36
	Warburg & Goldschmidt	Buenos Aires, Argentina	2,975.00
	Benchimal & Company	Para, Brazil	3,048.66
	Compania Pastoril Paraense	do	4,959.81
	Eduardo Ruggio	Montevideo, Uruguay	5.98
	Rossi & Company	do	17.14
	Moreiva Sobrinbro & Company	Maranhan, Brazil	1.15
	Diaz Cardoza & Company	Para, Brazil	25.00
	Luiz Machado	do	113.21
	Weber & Schweizer	Bahia, Brazil	56.68
	Rodolfo Leyser		1,940.84
	Bush Terminal Company	New York	3,069.56
	L. H. F. Root	do	228.51
	New York Dock Company	do	7,915.18
	Collins & Company	do	23.36
	Sanderson & Son	do	95.03
	Eugene Suter		11,572.72

Exhibit I Annexed to Answering Affidavit of George E. Warren 1651

L. D. Caulk & Company		17,532.68	
Consolidated Dental Mfg. Co.	do	4,340.49	
S. S. White Dental Mfg. Co.	do	9,437.74	
Benjamin C. Wilson	Cincinnati	14,122.99	
Estate Carvalho	New York	2,701.16	
Florentino Forrera	do	639.37	
Georges Haussmann	do	812.86	
Terheyden & Company	do	561.71	
C. W. Jean & Company	do	23.10	
Flint & Walling Mfg. Co.	do	34.48	1652
Pelton & Crane Company	do	16.80	
W. & B. Douglas	do	398.51	
W. E. Sutton & Company	do	167.40	
R. E. Dietz Company	do	55.77	
David S. Hays	do	87.99	
Hammond Typewriter Company	do	200.00	
Standard Paint Company	do	213.81	
American Blower Company	do	1,075.73	
Crayton Hardwood Lbr. Company	do	44.24	
R. F. Avery & Sons	do	6.00	
Deere & Company	do	21.94	
Roderick Lean Mfg. Company	do	63.43	1653
	Carried Forward	$114,134.12	

CROSSMAN & SIELCKEN, in Liqn.
By THORLEIF S. B. NIELSEN

1654 *Exhibit I Annexed to Answering Affidavit of George E. Warren*

SCHEDULE IX

ACCOUNTS PAYABLE—SEPTEMBER 30, 1917 (Cont'd.)

Due To Concerns In Neutral and Allied Countries: (Cont'd.)

	Brought Forward	$114,134.12
Sundry Creditors		8,533.41
United Fruit Company	New York	1,257.00
1655 Bauer de Columbia	Bogota, Columbia	30,821.67
Total Accounts Payable, Neutral and Allied Countries		$154,746.20

Miscellaneous Accounts Payable:

Burne & Burridge	$ 3,564.38
T. Weitling	4,563.63
J. F. Budelman	4,421.98
Total Miscellaneous Accounts Payable	$ 12,549.99
1656 Total, carried to Balance Sheet, Exhibit A	$167,296.19

Due To Concerns In Enemy Countries:

Ad. Guisemann & Company	Katachula, Mexico	$ 23,199.76
Carl Hoepeke & Company	Florianopolis, Brazil	10,049.95
Total, Carried to Balance Sheet, Exhibit A		$ 33,249.71

CROSSMAN & SIELCKEN, in Liqn.
By THORLEIF S. B. NIELSEN

Exhibit I Annexed to Answering Affidavit of George E. Warren 1657

SCHEDULE X

STATEMENT SHOWING PROBABLE ASSESSMENT OF EXCESS PROFITS TAX ON EARNINGS FOR NINE MONTHS ENDED SEPTEMBER 30, 1917

Net Profit after charging $211,759.74 interest on Mr. Herman Sielcken's Capital		$1,005,806.21
		1658
Deduct:		
Book Appreciation of Stocks and Bonds not yet earned		419,745.63
		$ 586,060.58
Invested Capital—$4,750,000.00		
Exemptions:		
*8% on Invested Capital for pre-war profits	$380,000.00	1659
Statutory exemption allowed partnerships	6,000.00	386,000.00
Taxable Income—not in excess of 15% of Invested Capital		$ 200,060.58
20% Tax on balance of 15% of Invested Capital		$ 40,012.00

*Note:

The partnership earned no pre-war profits and we have allowed a flat 8% on Invested Capital to cover the profits which should have been earned during 1911-1912 and 1913.

CROSSMAN & SIELCKEN, in Liqn.
By THORLEIF S. B. NIELSEN

1660 *Exhibit I Annexed to Answering Affidavit of George E. Warren*

SCHEDULE XI

PARTNERS' ACCOUNTS—SEPTEMBER 30, 1917

Herman Sielcken:		
Balance, January 1, 1917		$4,521,308.79
Add:		
Interest at 6% for nine months to September 30, 1917	$211,759.74	
1661 75% of Net Profit per Profit and Loss Account, Exhibit B	724,345.65	
	$936,105.39	
Deduct:		
Charges for nine months to Sept. 30, 1917	47,446.96	888,658.43
		$5,409,967.22
Thorlief Nielsen:		
1662 12 1/2% of Net Profit per Profit and Loss Account, Exhibit B	$120,724.28	
Deduct:		
Drawings for nine months to September 30, 1917	49,806.18	70,918.10
John Sorenson:		
12 1/2% of Net Profit per Profit and Loss Account, Exhibit B	$120,724.28	
Deduct:		
Drawings for nine months to September 30, 1917	56,840.07	63,884.21
Total Capital, carried to Balance Sheet, Exhibit A		$5,544,769.53

CROSSMAN & SIELCKEN, in Liqn.
By THORLEIF S. B. NIELSEN

Exhibit J Annexed to Answering Affidavit of George E. Warren. 1663

SURROGATE'S COURT,

COUNTY OF NEW YORK.

IN THE MATTER
of
The Transfer Tax on Estate of Hermann Sielcken, Deceased.

1664

County of New York, ss:

Frederick George Colley, Certified Public Accountant, being first duly sworn, does hereby depose and say

That he is a member of the firm of Arthur Young & Company, Public Accountants & Auditors of 71 Broadway, New York City.

That the attached accounts of Crossman and Sielcken (In Liquidation) to October 8, 1917 constitute a full and true copy of the report of Arthur Young & Company prepared from the books of Crossman and Sielcken to the date of the death of Herman Sielcken. 1665

In Witness Wherefore I hereunto set my hand and seal this twenty-third day of October, 1918

(sd) FREDERICK GEORGE COLLEY

Sworn to before me this 23 day
of October 1918.
(sd.) Isabel R. Richards,
Notary Public,
Kings County.
Kings County No. 156—Reg. No. 9092.
New York Co. No. 109—Reg. No. 9221.
Commission expires Mar. 30, 1919.
(Seal)

1666 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

ARTHUR YOUNG & COMPANY
Accountants and Auditors

61 Broadway (Empire Building)
New York January 15, 1918.

The Columbia Trust Company,
Executors, Estate of Hermann Sielcken, Deceased,
61 Broadway, New York City.

1667

Dear sirs:

In accordance with your instructions we have examined the books and records of Crossman & Sielcken and have prepared therefrom the accompanying statements of the firm's affairs showing Mr. Sielcken's interest therein at the date of his death—October 8, 1917.

The business of Crossman & Sielcken was caried on until September 30, 1917 under the copartnership agreement dated June 2, 1913 between Hermann Sielcken, John S. Sorenson and Thorlief S. B. Nielsen.

1668 The agreement provided that in the event of a termination of the partnership the Assets less all Liabilities should revert to Mr. Sielcken.

As the result of the United States declaring war against Germany and Mr. Sielcken being considered, on account of his residence in Germany to be an enemy, the Alien Property Custodian required the concern to discontinue business as of September 30, 1917 and appointed Messrs. Sorenson and Nielsen as Liquidators.

The statements submitted herewith compare the condition of the firm's affairs at the termination of the partnership September 30, 1917 with the condition at October 8, 1917, the date of Mr. Sielcken's death.

The Capital Value of Mr. Sielcken's interest in the firm of Crossman and Sielcken at date of his decease as shown by the books and brought out in Exhibit A was $5,398,704.07.

We understand that you have received a copy of our report showing the condition of the firm's affairs at

Exhibit J Annexed to Answering Affidavit of George E. Warren 1669

September 30, 1917 and we are therefore restricting our present remarks to the changes which have taken place since that date.

The changes are explained as follows:

Cash	Increase	$160,357.87	
Receipts			
Collateral Loans		$109,913.32	1670
Notes Receivable Collected		8,832.77	
Accounts Receivable Collected		116,577.48	
Cash Sales		218.78	
Interest		11.71	
Accounts Payable—overpaid		22.50	
		$235,576.56	
Deduct:			
Disbursements			
Accounts Paid	$44,531.94		1671
Cash Purchases	28,108.09		
Pay-rolls	1,238.83		
Rent	1,125.00		
Herman Sielcken Charges	176.91		
Expenses	37.92	75,218.69	
Increase as above		$160,357.87	
Marketable Securities	Decrease	$ 12,227.50	
Depreciation of Securities to Correspond with Market Values at October 8, 1917.			
Collateral Loans Receivable	Decrease	$108,371.46	

1672 *Exhibit J Annexed to Answering Affidavit of George E. Worren*

Cash Collected		$109,913.32
Less: Interest		1,541.86
	Decrease as above	$108,371.46
Notes Receivable	Decrease	$374.02
Cash collected		$8,832.77
Deduct: Additional Notes		
1673 Received		8,458.75
	Decrease as above	$374.02
Accounts Receivable	Increase	$ 47,493,33
Sales charged to Customers		$148,738.12
Interest charged to Customers		2,873.00
Reserve for profits due Managers		5,268.98
1674 Proportion of Expenses borne by Messrs. Sorenson and Nielsen		700.37
Transfer to Accounts Payable		14,949.09
		$172,529.56
Deduct:		
Cash Collected	$116,577.48	
Additional Notes Receivable	8,458.75	125,036.23
	Increase as above	$47,493.33
Inventories	Decrease	$113,210.01

Exhibit J Annexed to Answering Affidavit of George E. Warren 1675

Sales Cash		$ 218.78
Sales charged to Customers		148,738.12
		$148,956.90
Deduct:		
Purchases Cash	28,108.09	
Purchases credited to Accounts Payable	7,638.80	35,746.89
Decrease as above		$113,210.01
Deferred Charges Increase		$834.68

Rent paid in advance and credited to Liquidation Account.

Accounts Payable Decrease		$20,019.06
Cash Paid		$44,531.94
Deduct:		
Purchases	$ 7,638.80	
Marine Insurance	1,486.10	
Expenses	158.33	
Manager's Salaries	258.06	
Rent Refund	22.50	
Transfer to Accounts Receivable	14,949.09	24,512.88
Decrease as above		$ 20,019.06

1676

1677

Partners Accounts

These are fully explained in Schedule XIII.

Yours very truly,

ARTHUR YOUNG & CO.

1678 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

OCTOBER 8, 1917.

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Exhibit J Annexed to Answering Affidavit of George E. Warren

CROSSMAN AND SIELCKEN (IN LIQUIDATION) — **Exhibit A**

COMPARATIVE BALANCE SHEET-OCTOBER 8, 1917

ASSETS	September 30, 1917	October 8, 1917	Increase or *Decrease
CURRENT ASSETS:			
Cash on Hand and in Banks (Schedule I)	$ 277,473.72	$ 437,831.59	$160,357.87
Marketable Securities (Schedule II)	504,260.75	492,033.25	*12,227.50
Collateral Loans Receivable	1,444,724.17	1,336,352.71	*108,371.46
Notes Receivable (Schedule IV)	348,154.68	347,780.66	* 374.02
Accounts Receivable (Sch. V)- Due from Domestic, Allied and Neutral Concerns	1,934,227.97	1,981,721.30	47,493.33
Inventories (Schedule VI)	208,206.35	94,996.34	*113,210.01
Total Current Assets	$4,717,047.64	$4,690,715.85	*$ 26,331.79
DUE FROM CONCERNS IN ENEMY COUNTRIES (Schedule VII)	664,167.03	664,167.03	-- ----
STOCKS AND BONDS (Schedule VIII)	1,114,112.76	1,114,112.76	-- ----
DEFERRED CHARGES:			
Rent paid in advance	-- ----	834.68	834.68
	$6,495,327.43	$6,469,830.32	*$ 25,497.11

LIABILITIES	September 30, 1917	October 8, 1917	Increase or Decrease
CURRENT LIABILITIES:			
Loans and Notes Payable (Schedule IX)	$ 710,000.00	$ 710,000.00	$ ------
Accounts Payable- Due to Domestic, Allied and Neutral Concerns (Schedule X)	167,296.19	147,277.13	*20,019.06
Total Current Liabilities	877,296.19	$ 857,277.13	*$20,019.06
DUE TO CONCERNS IN ENEMY COUNTRIES (Schedule XI)	33,249.71	33,249.71	------
RESERVES:			
For Excess Profits Tax (Schedule XII)	40,012.00	40,012.00	------
For Profits due Managers	------	5,268.98	5,268.98
PARTNERS' ACCOUNTS: (Sch. XIII)			
Hermann Sielcken	5,409,967.22	5,398,704.07	*11,263.15
Thorlief Nielsen	70,918.10	71,176.16	258.06
John Sorenson	63,234.21	64,142.27	258.06
	$6,495,327.43	$6,469,830.32	*$25,497.11

* Denotes Figures in Red on Original.

1684 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

Exhibit B.

LIQUIDATION ACCOUNT—FOR EIGHT DAYS ENDED OCTOBER 8, 1917

Sales		$148,956.90	
Less:			
Cost of Sales:			
Purchases	$35,746.89		
1685 Decrease in Inventory	113,210.01	148,956.90	
Liquidators' Remuneration		$ 516.12	
Office Salaries		1,238.83	
Managers' Salaries		258.06	
Rent of Premises		290.32	
Marine Insurance		1,486.10	
General Expenses		196.25	
Depreciation of Marketable Securities		12,227.50	$16,213.18
Deduct:			
Other Income:			
1686 Interest			4,426.57
			$11,786.61
Deduct:			
Proportion of expenses borne by Sorenson and Nielsen, 20% of expenses excluding Liquidators' Remuneration and Rent		$ 635.85	
Rent at $3,000 per annum being approximate amount Sorenson and Nielsen would be obliged to pay for suitable premises		64.52	700.37
NET LOSS transferred to Hermann Sielcken's Capital Account			$11,086.24

Exhibit J Annexed to Answering Affidavit of George E. Warren 1687

Schedule I.

CROSSMAN & SIELCKEN (IN LIQUIDATION)

Cash in Banks and on Hand—October 8, 1917

In Banks:		
Equitable Trust Company	$ 27,216.33	
National City Bank	10,906.78	
Chase National Bank	4,611.18	
Guaranty Trust Company	11,489.47	1688
Corn Exchange Bank	3,561.19	
Hanover National Bank	50,794.64	
Columbia Trust Company	324,752.00	
Total Cash in Banks	$433,331.59	
On Hand:	4,500.00	
TOTAL, carried to Balance Sheet, Exhibit A	$437,831.59	

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Exhibit J Annexed to Answering Affidavit of George E. Warren

Schedule II

CROSSMAN AND SIELCKEN (IN LIQUIDATION)

MARKETABLE SECURITIES-OCTOBER 8, 1917.

Number Held	Nature of Securities	Par Value	Cost		Market and Book Value (October 8)		
BONDS							
6	New York City 4 ¼s due 1962	$1000	$ 6,015.00		98 ¼	$ 5,895.00	
35	Kansas City Terminal Railway 4s due 1960	1000	33,250.00		80	28,000.00	
42	Colorado Industrial Company 5s due 1934	1000	31,500.00		75 ½	31,710.00	
25	Southern Pacific Refunding 4s due 1955	1000	23,737.50		84 ¾	21,156.25	
46	New York Central Debenture 4s due 1934	1000	41,084.50		81	37,260.00	
30	United States Liberty Bonds 3 ½s	1000	30,000.00	$165,587.00	99.54	29,862.00	$153,883.25
STOCKS							
20	American Sugar Refining Company	$100	$ 2,240.00		107 ¼	$ 2,145.00	
1000	Brooklyn Union Gas Company	100	145,125.00		95	95,000.00	
642	Columbia Trust Company	100	127,422.20		285	182,970.00	
200	do. Benefit Certificates	--	3,500.00		11	2,200.00	
144	General Development Company	25	1,905.12		25	3,600.00	
200	Kansas City Southern Railroad Company, Preferred	100	13,064.47		50 ½	10,100.00	
300	do Common	100	11,934.50		18	5,400.00	
300	Lawyers Title Insurance and Trust Company	100	93,750.00		105	31,500.00	
100	Miami Copper Company	5	2,250.00		32 ½	3,250.00	
5	Pittsburgh Plate Glass Company, Common	100	500.00		119	595.00	
	Atlantic Mutual Insurance Company, Scrip	---	1,390.00	403,081.29	--	1,390.00	338,150.00
				$568,668.29			
	TOTAL, carried to Balance Sheet, Exhibit A						$492,033.25

Exhibit J Annexed to Answering Affidavit of George E. Warren

SCHEDULE III

CROSSMAN AND SIELCKEN (IN LIQUIDATION)

COLLATERAL LOANS RECEIVABLE, OCTOBER 8, 1917.

Name	Location	Nature of Collateral	Balance at Sept. 30, 1917 Less Cash Collected Since	Interest for 8 Days		Balance October 8, 1917 Value of Collateral	Indebtedness
Hilker, Paul G.	Baltimore, Md.	Rubber	$ 726,468.69	5½%	$ 928.88	$ 826,167.26	$ 727,397.57
Heusser, H.	do	Coffee	127,795.94	none		115,911.45	127,795.94
Seitz, Louis	do.	Coffee	27,377.55	6%	51.26	27,428.81	27,428.81
Mitchell Bros.	do.	Coffee	219,963.49	6%	342.60	228,502.30	220,306.09
Stanatopulo, S. D.	do.	Coffee	20,286.67	6%	27.05	20,286.67	20,313.72
Pickslay, J. D.	do.	Fidelity & Phoenix Insurance Co. Stock Certificates	2,316.29	5%	2.57	2,316.29	2,318.86
Rohrecke, G.	do.	Miami Copper Company & Atchison, Topeka & Santa Fe Stock Certificates	10,547.05	5%	11.68	10,547.05	10,558.73
Koehrmann, J. W.	Toledo, Ohio	Woolson Spice Company—Stock Certificates	32,045.13	4%	28.49	32,045.13	32,073.62
Biggs, F. H.	do.	do.	16,022.57	4%	14.24	16,022.57	16,036.81
Nielsen, Thorlief	New York City	do.	15,984.64	4%	14.21	15,984.64	15,998.85
Sorenson, John S.	do.	do.	15,984.64	4%	14.21	15,984.64	15,998.85
Vanderlip, Frank A.	do.	do.	32,013.19	4%	28.45	32,018.19	32,046.64
Shotton Coffee Co.,	W. St. Louis, Mo.	Real Estate and Insurance Policies	88,000.00	5%	78.22	88,000.00	88,078.22
			$1,334,810.85		$1,541.86	$1,431,215.00	
						1,336,352.71	
		Excess Collateral over Loans				$94,862.29	
TOTAL, carried to Balance Sheet, Exhibit A							$1,336,352.71

1696 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

Schedule IV.

CROSSMAN & SIELCKEN (IN LIQUIDATION)

NOTES RECEIVABLE—OCTOBER 8, 1917

	Maker	*Demand*	*Due Date*	*Amount*	*Total*
	AMERICAN:				
	G. S. Kutz	$1,900.00			
	The City Hall Realty Co.		June 20, 1918	$7,000.00	
	do		June 20, 1919	7,000.00	
1697	do		June 20, 1920	7,000.00	
	do		June 20, 1921	7,000.00	
	do		June 20, 1922	72,000.00	$100,000.00
	The Heekin Can Company		Jan. 7, 1918	$25,000.00	
	do		Jan. 14, 1918	25,000.00	
	do		Jan. 21, 1918	25,000.00	
	do		Jan. 28, 1918	25,000.00	
	do		Feb. 4, 1918	25,000.00	
	do		Feb. 11, 1918	25,000.00	
	do		Feb. 18, 1918	25,000.00	
	do		Feb. 25, 1918	25,000.00	200,000.00
1698	E. I. DuPont de Nemours & Co.		Oct. 19, 1917	$ 1,288.52	
	do		Oct. 19, 1917	8,600.00	9,888.52
	Braunling Coffee Company		Nov. 5, 1917		250.00
	National City Bank of New York		Dec. 10, 1917		1,792.14
	Pickslay, J. D.	2,300.00			
		$4,200.00			$311,930.66
	Due from concerns in neutral and allied countries:				
	Vorwerk & Company, Valparaiso		Oct. 31, 1917	$3,191.25	
	do		Jan. 4, 1918	8,458.75	$11,650.00
	Thomas Drysdale & Co., Buenos Aires				20,000.00
					$31,650.00

Exhibit J Annexed to Answering Affidavit of George E. Warren 1699

SUMMARY

Demand Notes Receivable		$4,200.00
Time Notes Receivable:		
Concerns in the United States	$311,930.66	
Concerns in Neutral and Allied Countries	31,650.00	343,580.66
TOTAL, carried to Balance Sheet, Exhibit A		$347,780.66

1700

Schedule V.

ACCOUNTS RECEIVABLE—OCTOBER 8, 1917

J. G. Aranjo	$43,251.25
A. Monrao & Company	9,283.31
Bromberg & Company	8,702.89
Thos. Drysdale & Company	32,615.49
Franklin Veras & Company	477.66
Fonck & Company	486.25
Guinle & Company	47,459.85
Gustav Graeff	2,438.11
John Lumsden	27.98
H. Theo. Muller	5,924.64
Leite, Jr. & Company	716.09
Leonel de Carvalho	50.23
Louis Hermanny & Company	88,380.88
Merrelles & Company	1,280.31
Pires Franco & Company	1,949.89
Rieckmann & Company	26,775.87
Ricardo Schultz & Company	11,059.03
Robert Pusterla & Company	13,523.05
Semper & Company	1,212.17
Stubenrauch & Company	3,957.85
Hime & Company	17.00
Vorwerk & Company	20,397.62
Jose Novita & Amido	7,164.75
Mostardira Irmao	3.58

1701

1702 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

Piza, Piza & Company	330.81
Bianchi & Hamres	11.05
Jorge Barry & Hermanes	17.72
Hermann Lundgren	39.09
Ferreira Costa & Company	11.05
Ferreira Gomez & Company	7.76
Cereija & Company	1,263.05
Richard Lodders	34.75
Guerin & Company	534.73
1703 Ferreira & Irmar	115.39
R. E. G. Jaacke	25.73
Salvo Componias & Company	1,038.85
A. Lisboa & Company	16.15
Fereira Mattos & Company	356.38
Ferreira de Oliveira & Sobrinho	190.56
Eugenio Barth & Company	3.95
Arzeno & Daruspe	1,298.67
Ramon Jove	5.33
Barrera & Company	78.60
A. Acosta & Company	112.50
Broqua & Schollberg	519.07
Anezin Harmanos & Company	13.48
1704 Juan Marabotto & Company	183.65
Escola de Eugenharria	8.20
Cia Argentina Instrumental Cientifico	12.48
Dr. Joas Noronha Santos	5.25
Eduardo Germain	908.60
Jacob Walter & Company	1,040.00
Bromberg & Company	341.97
Warburg & Goldschmidt	848.78
A. A. Barhati & Company	18.00
A. F. DeSouza & Company	111.29
Banco de Columbia	17.42
Lewers & Cooke, Ltd.	11,745.79
Honolulu Rapid Transit & Land Company	21,355.79
Milton E. Springer & Company	10.53
Wm. Rummell	129.97
J. H. Butler & Company	37.65
John Danks & Sons	398.98
Commonwealth Typewriter Exchange	166.60

Exhibit J Annexed to Answering Affidavit of George E. Warren

Stott & Underwood	23.91	
Chas. Davis	786.39	
Noyes Brothers	1,075.73	
Philip Brothers	206.30	
Scott Brothers	66.92	
Philip Brothers	22.49	
Atkinson & Son	55.77	
Blagden & Company	186.09	
Wm. Dunn & Company	128.00	
Hodgson, Hay & Company	77.50	
Carthy & Cooke, Ltd.	3.00	1706
McLeon & Archibald	83.63	
Antonio Rideiro	113.80	
D. Frenkel, Ltd.	50.79	
Levering Coffee Company	416,255.77	
Williams Russell & Company	57.76	
Williams Russell & Company	12,902.99	
Alzamora Palazio & Company	32.12	
Export Rebuilt Typewriter Company	1,000.00	
National Carbon Company	2,200.00	
J. Avon & Company	213.58	
Bennett Day & Company	334.00	
Eppens Smith Company	2,911.40	1707
Estate of James Everard	43.14	
Frederick M. Genung	335.85	
Panama S. S. Company	209.02	
Smith Kirkpatrick & Company	143.28	
Waldorf Astoria Hotel Company	10,595.18	
Johnson Layn Coffee Company	1.55	
United States Army	23,172.82	
United States Navy	9,982.38	
Montgomery, Ward & Company	2,048.15	
Jones Hukin Company	23,794.65	
Booth & Company	190.00	
John O'Donohue & Sons	42.30	
Russell & Company	702.54	
H. B. Hollins & Company	10,592.11	
Walter F. Blake	15,438.71	
Wm. S. Scull & Company	1,367.06	

1708 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

	John S. Sills & Company	692.62
	S. D. Stanatopulo	308.70
	Mitchell Brothers	4,692.37
	Sprague Warner & Company	3,622.87
	Widlar & Company	2,177.45
	Sundry Debtors	17,485.54
	Woolson Spice Company	21,428.04
	Estate of Geo. C. Boldt	375,615.45
	Grebe & Drebel	23.62
1709	New York Central R. R. Company	42.90
	Mica Insulator Company	711.53
	Hot Point Electric Htg. Company	12.10
		$1,334,781.27

FOREIGN DRAFTS SENT OUT FOR COLLECTION:

	Berringer & Company	$ 2,451.28	
	Banco Nacional Ultramarino	24,447.35	
	Banco Aleman Transatlantico	449.80	
	Banco de Para	37,413.71	
	Banco de La Nacion Argentina	2,019.00	
1710	Brazilianische Bank fur Deutschland	100,809.85	
	Banco de Brazil	1,947.56	
	Moreira Gomes & Company	452.23	
	Marc Jacob	126.16	
	Deutsche Sud Amerika Bank	1,612.36	
	Francisco Aguiar & Company	11,559.46	
	Agencia Gomezz	2,005.18	
	International Banking Corporation	658.19	
	National City Bank	160,614.65	
	J. Henry Schroder & Company	152.68	
	Kleinworth Sons & Company	4,210.83	
	Danske Landsman Bank	2,680.09	
	Colonial Bank	166.89	353,777.27

Exhibit J Annexed to Answering Affidavit of George E. Warren 1711

MISCELLANEOUS ACCOUNTS RECEIVABLE:

Transportation Insurance	89.01	
Employes' Accounts	2,604.20	
Government of Sao Paulo	89,606.09	
Special Interest Account	12,347.65	
J. Henry Schroder & Company	15,240.89	
Kleinworth Sons & Company	2,511.96	
Sorenson & Nielsen	170,762.96	293,162.76
Total, carried to Balance Sheet, Exhibit A		$1,981,721.30

1712

Schedule VI.

CROSSMAN & SIELCKEN (IN LIQUIDATION)

INVENTORY CERTIFICATE

October 8, 1917.

We, John S. Sorenson and Thorlief S. B. Nielsen, hereby certify that the merchandise on hand October 8th, 1917, paid for by Crossman and Sielcken, and not charged to clients, was as follows: 1713

Export Merchandise	$77,847.16
Coffee	17,149.18
	$94,996.34

(Signed) JOHN S. SORENSON
(Signed) THORLIEF S. B. NIELSEN

1714 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

Schedule VII.

CROSSMAN AND SIELCKEN (IN LIQUIDATION)

DUE FROM CONCERNS IN ENEMY COUNTRIES—OCTOBER 8, 1917.

Siegmund Robinow & Sohn	Hamburg, Germany	$ 74.55
Theodor Wille	do.	403,033.72
Ohliger & Company	Manaos, Brazil	5,850.68
1715 Perinam Ziegler & Company	Hamburg, Germany	175,000.00
I. Behrens & Sohn	do.	320.23
H. Diedricksen & Company	do.	79,887.85
Total, carried to Balance Sheet, Exhibit A		$664,167.03

NOTE:—

360 shares of the Woolson Spice Company Common Stock are held in trust by Crossman and Sielcken for Theodor Wille, Hamburg. The certificates
1716 of stock are in the name of Hermann Sielcken.

Exhibit J Annexed to Answering Affidavit of George E. Warren

Schedule VIII.

CROSSMAN AND SIELCKEN (IN LIQUIDATION)

STOCKS AND BONDS—OCTOBER 8, 1917

Number Held	Name of Company	Par Value	Cost		Present Market or Book Value	
STOCKS						
50	American District Telegraph Company of Brooklyn	$ 25.	$ 1,250.00		$ 500.00	
50	First Re-insurance Company of Hartford	100.	10,000.00		10,000.00	
35	Lincoln National Bank of Pittsburgh	100.	8,750.00		4,375.00	
5	Mercantile Insurance Company of America	100.	750.00		750.00	
50	Pittsburgh Plate Glass Company, Preferred	100.	12,500.00		12,500.00	
380	Sao Paulo Coffee Estates		6,251.64		6,251.64	
1000	Wm. Shotten Coffee Company, Preferred	100.	100,000.00		100,000.00	
36 1/4	Sheffield Coal and Iron Company—Preferred)					
364	do Common)					
5	do 1st Mortgage 5% Bonds)		6,261.25		4,130.62	
2	United States Lloyds Certificates		7,600.00		8,000.00	
824	The Woolson Spice Company	100.	413,950.00	$569,312.89	906,400.00	$1,052,907.26
BONDS						
50	Bethlehem Steel Company 5% Bonds due 1936	$ 1,000.	$ 50,287.50		$ 48,000.00	
60	Deutscher, Verein 1st Mortgage Bonds 2% and 3%	100.	2,700.00		2,700.00	
5	Kansas City, Shreveport and Gulf Terminal Company 4% Bonds due 1927		1,630.00		1,250.00	
3	New York and Greenwood Lake Railway 5% Bonds due 1946	2 at 1,000.				
		1 at 100.	2,104.20		2,005.50	48,955.50
EXCHANGE MEMBERSHIPS						
2	Chicago Coffee Exchange Membership)					
1	Chicago Board of Trade Membership)					12,250.00
	TOTAL, carried to Balance Sheet, Exhibit A					$1,114,112.76

1720 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

Schedule IX.

LOANS AND NOTES PAYABLE—OCTOBER 8, 1917

	Due Date	Collateral	Amount
LOANS:			
Goldman, Sachs & Company	Oct. 19, 1917	Rubber	$ 50,000.00
do.	do.	do.	50,000.00
1721 Philadelphia National Bank	Dec. 17, 1917	do.	50,000.00
do.	do.	do.	50,000.00
do.	do.	do.	50,000.00
do.	do.	do.	50,000.00
do.	do.	do.	50,000.00
do.	do.	do.	50,000.00
National City Bank	Dec. 23, 1917	do.	50,000.00
do.	do.	do.	50,000.00
do.	do.	do.	50,000.00
do.	do.	do.	50,000.00
do.	do.	do.	50,000.00
do.	do.	do.	50,000.00
1722			$700,000.00
NOTES:			
Vorwerk & Company	Oct. 22, 1917		$ 4,058.12
do.	Nov. 23, 1917		5,941.88
			$ 10,000.00
Total, carried to Balance Sheet, Exhibit A			$710,000.00

Exhibit J Annexed to Answering Affidavit of George E. Warren 1723

Schedule X.

CROSSMAN AND SIELCKEN (IN LIQUIDATION)

ACCOUNTS PAYABLE—OCTOBER 8, 1917

R. G. Clinckett	$ 82.52	
Allen & Robinson	3,758.83	
F. N. Roach & Company	15.78	
Cunha & Company	4,183.20	
Agencia Gomes	604.30	1724
A. Vallega	1,974.59	
Francisco Aguiar & Company	571.85	
Besa & Company	43.09	
J. C. Botelho	1,386.70	
Lahusen & Company	2,225.19	
Mareiva, Gomes & Company	744.33	
A. M. Slack	478.22	
Unias de Ferrias	38.45	
Leopoldino Ry. Company	8,207.32	
Ernesto Tornquist & Company	61.86	
A. Carvalho	45.36	
Warburg & Goldschmidt	3,039.94	1725
Benchimal & Company	3,048.66	
Compania Pastoril	4,959.81	
Ed. Ruggio	5.98	
Rossi & Company	17.14	
Moreiva Sobrinho & Company	1.15	
Diaz Gardosa & Company	25.00	
Luiz Bachado	113.21	
Weber & Schweizer	56.68	
Rudolph Leyser	1,940.84	
Bush Terminal	3,069.56	
L. H. F. Root	358.19	
New York Dock Company	10,839.73	
Collins & Company	895.61	
Sanderson & Son	95.03	
Eugene Suter	11,572.72	
L. D. Caulk & Company	17,532.68	
Consolidated Dental Mfg. Company	4,340.49	

1726 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

S. S. White Mfg. Company	9,437.74
B. C. Wilson	14,122.99
Estate Carvalho	2,701.16
Florentino Forrera	639.37
Georges Haussmann	812.86
C. W. Jean & Company	23.10
Flint & Walling	34.48
Felton & Crane Company	16.80
W. & B. Douglas	398.51
1727 W. E. Sutton & Company	167.40
R. E. Dietz & Company	55.77
David S. Hays	87.99
Hammond Typewriter Company	150.00
Standard Paint Company	213.81
American Blower Company	1,075.73
Crayton Hardwood Lbr. Company	44.24
R. F. Avery & Sons	6.00
Deere & Company	21.94
Roderick Lean Mfg. Company	63.43
Kohler Kempe	5.00
Sehor Isolda	872.99
Pineda Lopez	819.54
1728 Bell Bag Company	33.50
Meldrum & Martin	653.96
Nathan J. Sullivan	1.00
St. Paul Fire & Marine Insurance Company	1,493.79
Wilcox Peck & Hughes	466.30
Linsser & Company	2,152.50
Cory & Herbert	.81
Charleston Terminal Company	22.40
Banco de Columbia	6,296.67
Austin Nichols & Company	68.00
Geo. Borgfeldt & Company	5.53
Export Rebuilt Typewriter Company	2,450.00
John Bingham	28.45
John N. Graham & Company	229.08
Swan & Finch Company	62.94
Gandelf Pratt Company	68.02
Banco Nacioal Nathonando	20.50
Arthur Domenguez Villa	32.62

Exhibit J Annexed to Answering Affidavit of George E. Warren 1729

Brazil Bank for Deutschland		72.53
Estate James Everard		378.79
Louis C. Hopkins Company		2.50
Paddock & Fowler Company		139.78
S. E. Hendrick & Company		10.00
Underwood Typewriter Company		1.05
Western Union Telegraph Company		3.00
Addressograph Company		3.48
F. S. Blackwell Company		6.75
Alfred P. Brown		115.10
Free Hand Binder Company		6.00
Interest Accrued		30.57
Horace S. Ely & Company		22.50
		$132,982.98

MISCELLANEOUS ACCOUNTS PAYABLE:

Burnet Burridge	$3,564.38	
T. Weitling	4,563.63	
J. F. Budelman	4,421.98	
Managers Salaries Accrued	258.06	
Due for Marine Insurance	1,486.10	14,294.15
Total, carried to Balance Sheet, Exhibit A		$147,277.13

1730

1731

Schedule XI.

CROSSMAN AND SIELCKEN (IN LIQUIDATION)

DUE TO CONCERNS IN ENEMY COUNTRIES—
OCTOBER 8, 1917

		Balance September 30, 1917	Balance October 8, 1917
Ad. Guiseman & Company	Hamburg, Germany	$23,199.76	$23,199.76
Carl Hoopeke & Company	do.	10,049.95	10,049.95
		$33,249.71	$33,249.71

1732 *Exhibit J Annexed to Answering Affidavit of George E. Warren*

Schedule XII.

CROSSMAN AND SIELCKEN (IN LIQUIDATION)

STATEMENT SHOWING PROBABLE ASSESSMENT OF EXCESS PROFITS TAX ON EARNINGS FOR NINE MONTHS AND 8 DAYS ENDED OCTOBER 8, 1917.

1733	Net Profit after charging $211,759.74 interest on Mr. Herman Sielcken's Capital		$1,005,806.21
	Deduct:		
	Book Appreciation of Stocks and Bonds—not yet earned		419,745.63
			$ 586,060.58
	Invested Capital—$4,750,000.00		
	Exemptions:		
1734	*8% on Invested Capital for pre-war profits	$380,000.00	
	Statutory exemption allowed Partnerships	— 6,000.00	386,000.00
	Taxable Income—not in excess of 15% of Invested Capital		$200,060.58
	20% Tax on balance of 15% of Invested Capital		$ 40,012.00

*NOTE:

The partnership earned no pre-war profits and we have allowed a flat 8% on Invested Capital to cover the profits which should have been earned during 1911-1912 and 1913.

Exhibit J Annexed to Answering Affidavit of George E. Warren 1735

Schedule XIII.

CROSSMAN AND SIELCKEN (IN LIQUIDATION)

PARTNER'S ACCOUNTS—OCTOBER 8, 1917

HERMAN SIELCKEN:

Balance September 30, 1917		$5,409,967.22
Net Loss, October 1 to October 8, 1917	$11,086.24	1736
Cash Charges, per Schedule I	176.91	11,263.15
		$5,398,704.07

THORLEIF NIELSEN:

Balance September 30, 1917	$70,918.10	
Liquidators Remuneration, 8 days	258.06	71,176.16

JOHN SORENSON:

Balance September 30, 1917	$63,884.21	1737
Liquidators Remuneration, 8 days	258.06	64,142.27

Total, carried to Balance Sheet, Exhibit A	$5,534,022.50

1738 **Exhibit K-1, Annexed to Answering Affidavit of George E. Warren.**

February 4, 1918

H. M. Kilbourn, Esq.,
Manager New York Office,
Alien Property Custodian,
111 Broadway, New York City.

Dear Mr. Kilbourn:

Referring to your inquiry in regard to the stock of the Woolson Spice Company held in the Sielcken Estate, I write to advise that this property is held by the Columbia Trust Company as Executor under the will
1739 of Hermann Sielcken, which will has been filed for probate in New York. We are advised that the status of the property held by the Executor has changed its character, so that it is no longer alien enemy property, title vesting in the executor, which is a New York corporation.

The executor will administer the estate and will account in due course of administration, accounting of course to the Alien Property Custodian for any property which would be payable to alien enemies. (This is in accordance with the terms of the license issued by the War Trade Board.)

1740 Under the Sielcken Will, we are directed to dispose of this property, and it is entirely possible that the stock of the Woolson Spice Company will be sold before we account, so that the stock will never become the property of an alien enemy. In view of this situation, I do not see that the executor would have any authority to transfer the stock to the name of the Alien Property Custodian. I might state that I have taken up this question with Mr. Morgan M. Mann, who is counsel for the Alien Property Custodian, and he concurs with these views.

As you are aware, before the stock was taken over by the Executor, shares were issued by Crossman & Sielcken in liquidation in the names of the several Directors appointed to represent the Alien Property Custodian, in order to qualify them as Directors.

Trusting this will give you the information you desire, I am

Yours very truly,

W
Vice President

Exhibit K-2, Annexed to Answering Affidavit of George E. Warren. 1741

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June 14, 1918.

Joseph A. Bower, Esq., Manager,
General Business Department,
Alien Property Custodian,
120 Broadway, New York City.

Dear Mr. Bower:

As you have been verbally advised, we have received an offer of $675.00 a share for the stock of the Woolson Spice Company, held by us as Executor of the estate of Hermann Sielcken, and by the firm of Crossman & Sielcken for account of Theodore Wille & Company of Hamburg, an alien enemy. 1742 The amount of the stock held by the Estate is 822 shares, although there is some question as to the ownership of one share of this stock, a claim having been made for this share by Judge Doyle, of Toledo. The stock held by the Executor can be sold in the usual way at public sale at Muller's Auction Rooms.

The stock held by Crossman & Sielcken in Liquidation for the alien enemy, amounts to 360 shares. This stock is held for account of Theodore Wille & Company of Hamburg, Germany, and has been reported to the Alien Property Custodian. The firm of Theodore Wille & 1743 Company owes the firm of Crossman & Sielcken in Liquidation something over $400,000, and the firm asserts the claim against the proceeds of the sale of the stock.

These two blocks of stock represent the control of the corporation, and the offer we have received is for the two lots together. Will you therefore kindly procure for us the proper authority to dispose of the 360 shares of stock belonging to the alien enemy, with directions as to the method you wish to have us pursue in putting the stock up for sale.

We would also like to have you advise us if you approve of the sale of the stock belonging to the Sielcken Estate in the way outlined above. The stock can be put up at any weekly sale, which is held on Wednesdays. We would be glad to arrange for the sale of both blocks on any date you may indicate.

Awaiting your further advices, we are,

Yours very truly,

W

Vice President.

1744 **Exhibit K-3, Annexed to Answering Affidavit of George E. Warren.**

July 16, 1918

Morgan M. Mann, Esq., Associate Counsel,
Alien Property Custodian,
110 West 42nd Street,
New York City.

Dear Judge Mann:

re. Estate of Hermann Sielcken

1745 We are writing to ask for your opinion as to the advisability of selling the stock of the Woolson Spice Company held by the firm of Crossman & Sielcken and by the estate of Hermann Sielcken. For your information, the facts are as follows—

The estate of Hermann Sielcken holds 822 shares of stock of the Woolson Spice Company out of a total capitalization of 1800 shares. The firm of Crossman & Sielcken in Liquidation owns 360 shares registered in the name of Hermann Sielcken, held in safe keeping for Theodore Wille of Hamburg, Germany. Theodore Wille owes the firm of Crossman & Sielcken approximately
1746 $400,000 on open account. Therefore, if the 360 shares of stock are sold, it is contemplated that the proceeds would be credited to the account.

Negotiations have been entered into with two groups, one a local group in Toledo, and one a group in New York, for the sale of the two blocks of stock enumerated above. The representative of the group in Toledo has agreed to bid $675.00 a share at auction, and we understand that the group in New York is willing to bid for this stock in competition.

One of the minority stockholders of the Woolson Spice Company has intimated that he may possibly bring an action against the Sielcken Estate to recover certain losses which the Woolson Spice Company suffered under the management of Hermann Sielcken during the years 1913-14-15, I believe, the gross amount of these alleged losses being about $850,000.00. The question of this

Exhibit K-3 Annexed to Answering Affidavit of George E. Warren 1747

possible action has a bearing on the sale of the stock held by the Estate in that if a recovery were had by the minority stockholder, the Sielcken Estate would benefit as a stockholder of the Woolson Spice Company to the extent of 822-ths of the total amount recovered. On the

1800

other hand, we now have an opportunity to sell the stock at what is apparently an advantageous price under existing conditions, while the retention of this stock 1748
by the estate would undoubtedly work to the injury of the Woolson Spice Company owing to the German connection, which has already hurt the business of the company. Moreover, even if the stockholder who threatens an action against the company should abandon his purpose, there is nothing to prevent any of the other minority stockholders from bringing a similar action.

In view of the fact that this estate is being administered under the supervision of the Alien Property Custodian, we would appreciate your views as to the advisability of putting the stock up for sale as is contemplated, on Wednesday, the 24th instant, and if you consider it advisable to go ahead with the contemplated 1749
sale, we would appreciate your instructions as to the method of advertising you wish us to pursue, especially in regard to the stock directly represented by the Alien Property Custodian, viz., 360 shares held for the account of Theodore Wille.

Very truly yours,

GEW
Vice President

gew.dw

1750 **Exhibit K-4, Annexed to Answering Affidavit of George E. Warren.**

ALIEN PROPERTY CUSTODIAN

SIXTEENTH AND P STREETS NW,

Washington, D. C.

New York, N. Y.
April 16, 1918.

George E. Warren, Esq., Vice President,
Columbia Trust Company,
1751 New York City.

Dear Mr. Warren:—

I am returning herewith the Crossman & Sielcken report delivered to me yesterday from your office.

I had an opportunity to discuss the subject of the sale of the Woolson Spice Company stock with Mr. Palmer yesterday afternoon. After giving the matter considerable thought and going over the reports, we all agreed that:

1. The sale of the stock is a responsibility the Trust Company should assume, at a price that it thinks fair and reasonable.

1752 2. We know of no particular reason why it should be sold at public auction, except to eliminate the possibilities of criticism, and then only should be done if you are sure of a firm bid that is satisfactory.

3. We thought an up-set price should be put on the stock of $800 a share, provided all of it is purchased, and if you are unsuccessful in securing that as a minimum, then you might consider whether or not it would not be desirable to liquidate the Company, inasmuch as the book value of the tangible assets, which seem to be liquid and easily convertible, are in excess of $900 a share.

Very respectfully,

J. A. BOWER
Manager, General Business Dpt.

BJ.
Enc.

Exhibit K-5, Annexed to Answering Affidavit of George E. Warren. 1753

ALIEN PROPERTY CUSTODIAN

SIXTEENTH AND P STREETS NW.

Washington, D. C.

June 3, 1918.

The Columbia Trust Company,
New York City.

Attention of Mr. George E. Warren. 1754

Dear Mr. Warren:

Re: Trust No. 1—Herman Sielcken.

With further reference to your letter of May 7th regarding the sum of $100,000 paid in October, 1917, by Crossman and Sielcken to this office for the account of Herman Sielcken before it was known that Herman Sielcken had died:

As this money was received by us from Crossman and Sielcken and not from the Columbia Trust Company, I 1755
do not feel that we can very well give a receipt to the Columbia Trust Company and, as a matter of fact, we have already given an informal receipt to Crossman and Sielcken and another recipt might conceivably make us chargeable with $200,000 instead of the $100,000 which was actually paid.

I am, however, giving instructions that the formal receipt on the regular A.P.C. form shall at once be prepared and sent to Crossman and Sielcken. It occurs to me that this receipt can then be turned over to you by Crossman & Sielcken as an accounting by them of $100,000 of Herman Sielcken's estate. This will have the practical result of treating the payment of $100,000 as an advance payment to the Alien Property Custodian from Herman Sielcken's estate.

Very truly yours,

F. J. HORNE
Director, Bureau of Trusts.

ME/OK

1768 **Exhibit K-6, Annexed to Answering Affidavit of George E. Warren.**

IRVING TRUST COMPANY, NEW YORK

ALIEN PROPERTY CUSTODIAN

SIXTEENTH AND P STREETS, N. W.,

Washington, D. C.

New York, N. Y.
June 19, 1918.

1769 George E. Warren, Esq., Vice President,
Columbia Trust Company,
New York City.

Dear Mr. Warren:

My understanding is that Judge Mann has told you of the manner in which all of the Woolson-Spice Company stock can be sold at once.

Very respectfully,

J. W. BOWER,
Manager, General Business Department.

BJ

1770

Exhibit K-7, Annexed to Answering Affidavit of George E. Warren. 1759

ALIEN PROPERTY CUSTODIAN

24 Broad Street

New York City

July 16, 1918.

George E. Warren, Esq.,
Vice President, Columbia Trust Company,
60 Broadway, New York City.

My dear Mr. Warren:— 1760

I have your letter of July 16 in the matter of the Estate of Hermann Sielcken, relative to the sale of certain shares of stock of the Woolson Spice Company.

I have considered the possibility of a suit by a minority stockholder referred to in your letter, and am of the opinion that despite this possibility the Executor of the Sielcken Will should proceed at once to sell not only the stock belonging to the estate, but that held by the estate for the account of Theodore Wille in one block at public auction as soon as possible.

I note in your letter that you state that the sale is contemplated on Wednesday, July 24. This meets with my approval, and I suggest that you sell it in accordance with the usual custom at the weekly sale of Adrian H. Muller at his auction rooms 14 & 16 Vesey Street, New York City. 1761

Very truly yours,

MORGAN M. MANN
Associate Counsel

MMM/EC

1762 **Exhibit L Annexed to Answering Affidavit of George E. Warren.**

(Duplicate)

A. P. C. Form
No. 106-E
Demand on Fiduciary

Report No. 17412
Trust No. C-1

ALIEN PROPERTY CUSTODIAN

1763 DEMAND BY ALIEN PROPERTY CUSTODIAN FOR PROPERTY

Extracts from "Trading with the enemy Act":

Sec. 7 (c). "If the President shall so require any money or other property owing or belonging to or held for, by on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

1764

Sec. 7 (e). "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case

Exhibit L Annexed to Answering Affidavit of George E. Warren 1765

of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee."

1766

Extracts from Executive Order dated February 26, 1918.

Sec. 1 (c). "The words 'right', 'title', 'interest', 'estate', 'power', and 'authority' of the enemy, as used herein, shall be deemed to mean respectively such right, title, interest, estate, power, and authority of the enemy as may actually exist and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include respectively the right, title, interest, estate, power and authority in law or equity or otherwise of any representative of or trustee for the enemy or other person claiming under or in the right of, or for the benefit of, the enemy."

1767

Sec. 2 (a). "A demand for the conveyance, transfer, assignment, delivery and payment of money or other property unless expressly qualified or limited shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover."

Sec. 2 (c). "When demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded and such power or authority thereover as may be included within the demand,

1768 *Exhibit L Annexed to Answering Affidavit of George E. Warren*

and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the enemy Act' and with any orders rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

To Columbia Trust Company, as executor of the estate of Hermann Sielcken, deceased.

1769

Address 60 Broadway, New York, N. Y.

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, and the Executive orders issued in pursuance thereof, by virtue of the authority vested in me by said Act and said Executive orders, after investigation do determine that:

		Names of enemies whose address is
1770		
Trust #	46815	Gustav Diederichsen, Kiel, Germany.
"	"	Heinrich Diederichsen, Kiel, Germany.
"	"	Carl Isenberg, Germany.
"	"	Richard Isenberg, Germany.
"	46816	Heinrich Seidel, Baden-Baden, Germany.
"	46817	Lina Kraft, Baden-Baden, Germany.
"	46818	City of Baden, Baden-Baden, Germany.
"	46819	Josephine Heim Hospital, Baden-Baden, Germany.
"	12604	Clara Sielcken, Germany.

Exhibit L Annexed to Answering Affidavit of George E. Warren 1771

is an enemy (not holding a license granted by the President), and has a certain right, title, and interest in and to the estate of Herman Sielcken, deceased;

I, as Alien Property Custodian, hereby require that every right, title and interest of said enemy in and to the estate above described, including every power and authority thereover, shall be by you conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian, to be by me held, administered, and accounted for as provided by law, and that any money or property now or hereafter held by you which the enemy may at any time or times, now or hereafter, be entitled to receive either upon or without demand, shall at such time or times be conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian. 1772

I, as Alien Property Custodian, hereby further require that you shall give to me, as Alien Property Custodian, every notice in respect to the said estate to which the said enemy may be entitled.

The Columbia Trust Co. is hereby designated as depositary, and is authorized to receive, for and on behalf of the Alien Property Custodian, the property herein mentioned, and upon the service of this demand on you by said depositary, you are directed to deliver the said property to it forthwith. For money demanded, checks may be delivered to the depositary, which in all cases should be made payable to the Alien Property Custodian. 1773

Witness my hand and seal of office, this 27th day of September, 1918.

A. MITCHELL PALMER,
Alien Property Custodian.
By J. L. DAVIS
Managing Director.

JSB:ED

1774 *Exhibit L Annexed to Answering Affidavit of George E. Warren*

Service of the within demand accepted this 25th day of Oct, 1918

C T CO

By G E WARREN
V. P.

Served the within notice and demand on the within-named C T Co. at ..... Street in the City of ....., State of .....
1775 ....., this 25 day of Oct, 1918, by giving a true and correct copy thereof

(In the case of an individual.)

to the person of whom said demand is made.

(In the case of a partnership.)

to ....., a member of the partnership of whom said demand is made.

(In the case of a corporation.)

1776

to G E Warren, a V. P. of the corporation of whom said demand is made, at the office of said corporation.

C T CO

(Illegible)

(Strike out the inapplicable clauses.)

[illegible] of the State of California

[illegible] THE CITY AND COUNTY OF SAN FRANCISCO

Present Hon. X X Judge

In the matter of the application of [illegible] Sielcken | In open Court X Term A.D.

[illegible] a Citizen of the United States | [illegible] X [illegible] X

A.D. 1873 [illegible] Term

[illegible] TO THE SATISFACTION OF THIS COURT, by the oaths of [illegible] X

[illegible] Citizens of the United States of America, [illegible] for that purpose, [illegible] August Hermann Sielcken [illegible] a native of

[illegible] has resided within the limits and under the [illegible] of the United States [illegible] State of California for one year last past; and that [illegible] the Constitution of the United States [illegible] the Emperor of Germany

[illegible] ADJUDGED AND DECREED, that the said [illegible] August Hermann Sielcken [illegible] of the UNITED STATES OF AMERICA.

X X

[illegible]

[illegible] Superior Court of the State of California, in and for the City and County of San Francisco

[illegible] of an [illegible] | In Open Court

[illegible] Sielcken | January 6 A.D. 1873

[illegible] 7666 [illegible] 18

[illegible] August Hermann Sielcken

[illegible] X [illegible] X A.D. 1873

[illegible] X [illegible]

[illegible] Bernard J. Flood

Judge of the Superior Court

[illegible] of the State of California, [illegible]

[illegible] August Hermann Sielcken

[illegible] 6

[illegible]

[illegible] Exhibit "m" [illegible]

[illegible]

In the [illegible]

OF THE [illegible]

CITY AND COUNTY [illegible]

Department No. [illegible]

Judgment Restoring the [illegible]
Matter of the Naturalization of

August Herman Fielder
An Alien.

Entry Minute Order.

Minute Book Page

JUDGMENT

Instrument in Writing

Restoration of Naturalization Record
Judgment Book

J. No. Page 353

[illegible] Clerk.

By Deputy Clerk.

Exhibit N Annexed to Answering Affidavit of George E. Warren: 1783

D. A. & C.
E. 8.
for N.

Receipt of a Corporation Claiming any Interest, Right or Title in or to Money or Property on Claim Filed under Section 9 of the Trading with the Enemy Act. 1784

2281

Trust No. 1 Claim No. 5914

WHEREAS, pursuant to the provisions of Section 9 of the Act of Congress, known as the "Trading with the Enemy Act," and the regulations of the Alien Property Custodian in relation thereto, the undersigned has heretofore filed with the Alien Property Custodian notice of claim against the money and property in the hands of said Custodian or the Treasurer of the United States taken as the property of HERMAN SIELCKEN and/or ESTATE OF HERMAN SIELCKEN determined by said Custodian to be an enemy, and has also made application to the Attorney General of the United States for the allowance of said claim under the authority conferred on said Attorney General, by Article XXXII of the Executive Order of October 12, 1917; and 1785

WHEREAS, the Attorney General, exercising the authority so conferred, has ordered the payment of the money or delivery of the property hereinafter described to this applicant;

NOW, THEREFORE, in consideration of the premises, Columbia Trust Company as Executor of the Will of Herman Sielcken, deceased, a corporation in the State of New York, the undersigned, does hereby acknowledge

1786 *Exhibit N Annexed to Answering Affidavit of George E. Warren*

payment of the money or delivery of the property to it by the Alien Property Custodian and the Treasurer of the United States as follows, to wit:

No. Check of the Treasurer of the United States, on Special Account No. 8 to the order of Columbia Trust Company as Executor of the Will of Herman Sielcken, deceased, Trust #1, for the sum of Ninety-four Thousand, Three Hundred Fifty-one Dollars and Thirty Cents ($94,351.30); also All right,
1787 title and interest of Herman Sielcken, now deceased, in the copartnership of Crossman & Sielcken.

And does hereby further acknowledge and accept such money or other property as a full compliance with said order; reserving, however, to the Executor the right to claim and receive interest if and when provision may be made by legislation to that end.

In consideration of the premises, Columbia Trust Company, as Executor of the Will of Herman Sielcken, deceased, the undersigned, as aforesaid, does hereby release and forever discharge the President of the United States, the Treasurer of the United States, A. Mitchell
1788 Palmer, individually and as Alien Property Custodian, Francis P. Garvan, individually and as Alien Property Custodian, Thomas W. Miller, individually and as Alien Property Custodian, all other persons exercising the authority of them, or of any of them, from any and all right, claims and demands of every kind, character and description, whether joint or several, which it may have, based upon or arising out of any and all money or other property paid to or received by the Alien Property Custodian, or by the Treasurer of the United States as the money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of HERMAN SIELCKEN and/or ESTATE OF HERMAN SIELCKEN and does further release and forever discharge them in respect to anything done or omitted in pursuance of any order, rule or regulation made by the President under the authority of this Act, to the extent of the property above described.

Exhibit N Annexed to Answering Affidavit of George E. Warren 1789

IN WITNESS WHEREOF, Columbia Trust Company, as Executor of the Will of Herman Sielcken, deceased, the corporation as aforesaid, has caused these presents to be executed by George E. Warren, a Vice President, and its corporate seal to be hereunto affixed and attested by Samuel M. Spedon, an Asst. Secretary, this 5th day of April A. D. 1921.

COLUMBIA TRUST CO.
as Executor of Estate of Herman Sielcken
By G. E. WARREN 1790
Vice President

Attest:

S. M. SPEDON
Secretary.

Signed and Sealed
in the Presence of:
N. M. Morgan
H. F. Wilkens

State of New York
County of New York ss:

On the 5th day of April in the year 1921, before me 1791
personally came G. E. Warren to me known, who, being by me duly sworn, did depose and say that he resides in New York City; that he is the Vice President of The Columbia Trust Co., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order.

M. B. LAFOURIAL
(Stamp illegible.)

APC-MM-872.

1792 *Exhibit N Annexed to Answering Affidavit of George E. Warren*

APC-MM-778
Claim 5914
3/31/21

ALIEN PROPERTY CUSTODIAN

Statement of Property Taken over under Trust 1 in the name of Herman Sielcken except payments received by depositary since last report.

1793 Report Received from	Property Received	Income	Property Except Cash to be returned	Cash to be Returned
17412 Columbia Trust Co. as executor of Est. Herman Sielcken, and Crossman & Sielcken, N.Y. C.	All right, title and interest of Herman Sielcken, now deceased in the co-partnership of Crossman & Sielcken			
	Received on account of the liquidation of Crossman & Sielcken			100,000.00
1794	Paid expenses from this trust:			
	To Jos. K. Hutchinson		$2,056.00	
	To Knight, Boland, Hutchinson & Christian		3,592.70	5,648.70
	Balance to return			$ 94,351.30

Exhibit N-1, Annexed to Answering Affidavit of George E. Warren. 1795

April 5, 1921.

Alien Property Custodian,
16th and P Streets,
Washington, D. C.

Dear Sir:

Attention Mr. Caton

1796

I hand you herewith duplicate releases of Claim No. 5914 in connection with Trust No. 1, against our application for the payment of the sum of $100,000 held for account of the late HERMANN SIELCKEN, less deduction of $5,648.70, this property being claimed by Columbia Trust Company as executor, and shall be glad to receive check at your earliest convenience.

Very truly yours,

G. E. WARREN,
Vice President.

SM.
enc.

1797

Exhibit N-2, Annexed to Answering Affidavit of George E. Warren.

2281

DAVIES, AUERBACH & CORNELL,

MUTUAL LIFE BUILDING, 34 NASSAU STREET,

Joseph S. Auerbach
Edward Cornell
Charles E. Hotchkiss
Charles H. Tuttle
Nicholas F. Lenssen
Warner B. Matteson
Harold C. McCollom
Martin A. Schenck

1798 *Exhibit N-2 Annexed to Answering Affidavit of George E. Warren.*

New York, April 6, 1921.

Estate of Herman Sielcken, deceased.

Dear Sir:

Referring to the account of the Alien Property Custodian with you as the Executor of the Will of Hermann Sielcken, deceased, showing certain deductions from the fund of $100,000, I advise you that I have, and hereby
1799 do, approve all the deductions therein set forth, and consent that you as such executor may receive from the custodian the sum of $94,351.30, in full satisfaction of the said $100,000. I am advised that in the release which you are about to send to the custodian in respect of this payment you have reserved the right to claim and receive interest if the same may be provided by legislation hereafter enacted.

Yours very truly,

CLARA SIELCKEN

Columbia Trust Company,
1800 George E. Warren, Esq.,
Vice President,
60 Broadway,
New York City.

NK

In replying address only
The Alien Property Custodian
and refer to No. 2281

File ORJ)
G.E.

Exhibit N-3, Annexed to Answering Affidavit of George E. Warren. 1801

ALIEN PROPERTY CUSTODIAN

SIXTEENTH AND P STREETS NW.

Washington, D. C.

April 14, 1921.

Claim No. 5914
Trust No. 1
Re: Herman Sielcken. 1802

Columbia Trust Company,
60 Broadway,
New York City.

Gentlemen:

We are enclosing herewith check of the Treasurer of the United States No. 3842 for $94,351.30 drawn in the name of the Columbia Trust Company of New York, N. Y., as executor of the will of Herman Sielcken, deceased, Trust No. 1. This check is covered by releases executed by you on April 5, 1921. 1803

Kindly acknowledge receipt of the enclosed check.

Very truly yours,

R. H. JENKINS
Manager, Claim Section,
Bureau of Trusts.

EIY. Enclosure

In the correspondence of the Alien Property Custodian the word "enemy" is used as meaning "enemy" or "ally of enemy," as defined by the Trading with the enemy Act.

1804 **Exhibit N-4, Annexed to Answering Affidavit of George E. Warren.**

(Copy)

June 1, 1921.

Mrs. Clara Sielcken,
Hotel Waldorf-Astoria,
5th Ave. & 34th Street,
New York City.

1805 Dear Madam:

Your drawing account has credit today for $94,351.30 representing amount received by us from Alien Property Custodian for your account.

Kindly sign and return to us, the enclosed receipt.

Very truly yours,

S. M. SPEDON
Assistant Trust Officer.

HM/AFB
Encls.

1806

Exhibit N-5, Annexed to Answering Affidavit of George E. Warren. 1807

Cable Address
"Overdare"

Edward Cornell
Charles E. Hotchkiss
Charles H. Tuttle
Nicholas F. Lenssen
Warner B. Matteson
Harold C. McCollom
Martin A. Schenck 2281 E 1808

DAVIES, AUERBACH & CORNELL
Mutual Life Building, 34 Nassau Street

File W

New York June 1, 1921

Dear Sirs:

With respect to the sum of approximately $94,000, which was returned by the Alien Property Custodian, I understand that you are to deposit that to my account with you. I advise you that you may invest the amount in preferred stocks of the same corporation or of similar corporation of which you have already invested portions of my property. If you desire to consult with Mr. Hotchkiss concerning the same I shall be pleased to have you do so. 1809

Very truly yours,

CLARA SIELCKEN.

Columbia Trust Company,
George E. Warren, Esq.,
60 Broadway,
New York City.

Please buy through
Wessermann Brothers

1810 **Exhibit N-6, Annexed to Answering Affidavit of George E. Warren.**

Copy

June 1, 1921

Dear Mrs. Sielcken:

I write to advise that we are crediting your account today $94,351.30 representing the amount refunded to you by the Alien Property Custodian.

As requested yesterday, we have deposited with the Equitable Trust Company, 222 Broadway, for account
1811 of Mr. H. O. C. Isenberg, the sum of $5,000.00, which has been charged to your account.

We have also charged your account $358.90 in payment of the draft on London for £92-7-8, to the order of J. H. Schroder & Company, and are sending them this with the bill left with us yesterday.

Will you kindly sign and return to us the enclosed letter.

Yours faithfully,

G. E. WARREN
Vice President

1812

Mrs. Herman Sielcken,
The Waldorf-Astoria,
New York City.

Enclosure
RP

Exhibit O Annexed to Answering Affidavit of George E. Warren. 1813

A.P.C. 197

In replying address only
The Alien Property Custodian
and Refer to No.
Claim 3281
Trust 12604 2281
Report 17412-Z
Re. Mrs. Clara Sielcken

ALIEN PROPERTY CUSTODIAN 1814
Sixteenth and P Streets NW.
Washington, D. C.

April 2, 1921.

Columbia Trust Company,
60 Broadway,
New York City.

Gentlemen:

We have received releases executed this day by Clara Sielcken for all right, title and interest in and to the estate of Hermann Sielcken, deceased. 1815

You, as executor of the estate of Hermann Sielcken, may therefore now deal with the said interest of Clara Sielcken in the said estate in the same manner as though such interest had never been reported to or demanded by the Alien Property Custodian.

Very truly yours,

H. B. CATON
Director, Bureau of Trusts

CTG

In the correspondence of the Alien Property Custodian the word "enemy" is used as meaning "enemy" or "ally of enemy," as defined by the Trading with the enemy Act.

1816 **Exhibit P Annexed to Answering Affidavit of George E. Warren.**

At a Surrogate's Court, held in and for the County of New York, at the Hall of Records, on the 7th day of July, 1921.

Present: Hon. John P. Cohalan, Surrogate.

IN THE MATTER of The Judicial Settlement of the account of the COLUMBIA TRUST COMPANY, as Executor of the Last Will and Testament of Hermann Sielcken, deceased.	Final Decree

1817

The Columbia Trust Company (formerly the Columbia-Knickerbocker Trust Company) as Executor of the Last Will and Testament of Hermann Sielcken, deceased, having heretofore filed a petition on the 24th day of June, 1919, in the Surrogate's Court of the County of New York, for the judicial settlement of its account as such Executor and a citation having been thereupon issued,

1818 pursuant to statute, directed to all persons interested in the estate of said decedent citing them and each of them to show cause before said Surrogate upon the day and hour therein fixed, at the Surrogates' Court of said County, held in the Hall of Records in the County of New York, why the account of the Columbia Trust Company, as Executor as aforesaid, should not be judicially settled and the said citation having been returned with proof of due service upon all the persons to whom the same was directed and as all the parties so cited are now in default, having failed to appear herein in person or by attorney, except the following who have appeared herein by attorney, namely:

Eugene Suter, who has appeared by Alfred C. Coxe, his attorney,

John S. Sorenson, Thorleif S. B. Nielsen and Clara Sielcken, who have appeared herein by Davies, Auerbach & Cornell, their attorneys, and

Exhibit P Annexed to Answering Affidavit of George E. Warren 1819

The Alien Property Custodian by Morgan M. Mann, his attorney;

And the Executor's account under oath, with vouchers in support thereof, having been filed in this Court with its said petition for the settlement thereof.

The said petition for a final decree, settling the Executor's account, came on after sundry adjournments for a hearing at a Term of this Court on the 31st day of October, 1919, and was marked for a decree. On the same day, the Alien Property Custodian, a party in 1820
this proceeding, filed objections to the account and on the 11th day of November, 1919, an order was made by this Court appointing John F. Couch Referee herein. No hearing or proceeding of any kind was had before the Referee and on or about the 10th day of May, 1921, the Alien Property Custodian executed and delivered an instrument withdrawing the said objections to the account and consenting to the vacation of the said order of Reference and that this proceeding be marked for a decree. On the 11th day of May, 1921, the Referee executed and delivered his certificate stating that no proceeding had been had before him herein and that he had no objection to the vacating of said order of Refer- 1821
ence. On the 12th day of May, 1921, the said instrument withdrawing the objections to the account and the said certificate executed by the Referee were duly filed in this Court; and thereupon an order was duly made by his Honor, Surrogate Cohalan, and entered in this Court, allowing the withdrawal and cancellation of the said objections to the account and vacating the said order of Reference and directing that the final decree in this proceeding could now be submitted on giving notice of the settlement thereof to the parties who had appeared herein by attorney. No objection to the account (other than those above mentioned and cancelled) has been made by any party to this proceeding.

Now Therefore, upon motion of Smith & Agate, attorneys for the said Executor, due notice of the settlement of this decree having been served on the said attorneys

1822 *Exhibit P Annexed to Answering Affidavit of George E. Warren*

who have appeared herein, the said Surrogate, after having examined the said account, now finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof, made by the said Surrogate, as judicially settled and adjusted by him, to be recorded with and taken to be a part of the decree in this proceeding, to wit:

Summary Statement of the account of the Columbia Trust Company, as Executor of the Last Will and Testa-
1823 ment of Hermann Sielcken, deceased, extending from the date of the Executor's appointment to the 28th day of February, 1919, made by the Surrogate as judicially settled and allowed:

CASH

The executor is charged with the cash set forth in Schedule 1	439,138.22	
With cash received as shown in Schedule 2	6,630,920.45	$7,070,058.67

1824

The executor is credited with cash paid out as shown in the following Schedules:		
Schedule 3	1,020,072.97	
Schedule 4	761,986.15	
Schedule 5	2,295,922.63	
Schedule 6	100,000.00	$4,177,981.75
Balance of cash on hand		$2,892,076.92

ASSETS

The executor is charged with the amount of Schedule 1	6,463,481.21	
With income as shown in Schedule 2	252,940.26	$6,716,421.47

Exhibit P Annexed to Answering Affidavit of George E. Warren 1825

The executor is credited with the following schedules:

Schedule 3	1,020,072.97	
Schedule 4	761,986.15	
Schedule 6	100,000.00	
Schedule 7	599,091.36	
Schedule 9	58,451.27	
also amount paid for accrued interest on U. S. Certificates of indebtedness as shown in Schedule 5	3,205.50	$2,542,807.25

1826

Balance of assets now on hand as shown in Schedule 12, including cash on hand $4,173,614.22

Subject to alleged claims against the estate as shown in Schedule 10 and to the Executor's commissions as shown in Schedule 13 of the said account, with which said balance the Executor is hereby charged as of the said 28th day of February, 1919.

And, it appearing that the Executor has fully accounted for all the moneys and personal property of the estate of said decedent which came to its hands as such Executor, down to the said 28th day of February, 1919, and its account having been adjusted by the said Surrogate and a summary statement of the same having been made as above and herewith recorded; 1827

It Is Ordered, Adjudged And Decreed, that the said account be, and the same hereby is, judicially settled and allowed as filed and adjusted;

And It Is Further Ordered, Adjudged and Decreed, that out of the moneys remaining in its hands, the Executor shall pay the two legacies of Fifty thousand (50,000) Dollars each, to John S. Sorenson and Thorleif S. B. Nielsen respectively, as specified in the second article of the Will of said decedent:

1828 *Exhibit P Annexed to Answering Affidavit of George E. Warren*

And It Is Further Ordered, Adjudged and Decreed, that out of the moneys remaining in its hands, the Executor retain the sum of Thirty-four thousand fifty-five hundred and forty-eight/100 ($34,055.48) Dollars, for the commissions to which it is entitled on this accounting, as specified in Schedule 12 (twelve) of said account:

And It Is Further Ordered, Adjudged and Decreed, that all the assets and personal property that belonged to said decedent's estate on the said 28th day of February, 1919, after deducting the payments hereinbefore directed, are chargeable as hereinbefore adjudged to the said Executor for further administration:

1829

And It Is Further Ordered, Adjudged and Decreed, that the said Executor, upon complying with the directions herein contained, shall be fully freed and discharged from all liability, claim and demand as to the matters included in the said account.

(SD) JOHN P. COHALAN,
Surrogate.

1830

Exhibit Q Annexed to Answering Affidavit of George E. Warren. 1831

At a Surrogates' Court, held in and for the County of New York, at the Hall of Records, in the Borough of Manhattan, New York City, on the 11th day of July, 1922.

Present: Hon. James A. Foley, Surrogate.

IN THE MATTER of The Judicial Settlement of the Account of COLUMBIA TRUST COMPANY, as Executor of the Will of Hermann Sielcken, deceased.	Final Decree.

1832

The Columbia Trust Company (formerly the Columbia-Knickerbocker Trust Company) as Executor of the Will of Hermann Sielcken, deceased, having heretofore filed a petition on the 28th day of March, 1922, in the Surrogates' Court of the County of New York, for the judicial settlement of its account as such Executor from February 28th, 1919, the date of its last accounting to 1833
and including December 31st, 1921; and a citation having been thereupon issued, pursuant to statute, directed to all persons interested in the estate of said decedent, citing them and each of them to show cause before said Surrogate upon the day and hour therein fixed at the Surrogates' Court of said County, why the account of the Columbia Trust Company, as Executor as aforesaid, should not be judicially settled, and an order having been duly made herein on March 28th, 1922, directing service of the citation by publication, pursuant to statute, upon Gustav Diederichson, Georg Georgius, Carl Isenberg, Richard Isenberg, City of Baden-Baden, Woolson Spice Company and Thomas W. Miller, Alien Property Custodian, who are respectively non-residents of the State of New York, and upon whom personal service of the citation herein cannot with due diligence be

1834 *Exhibit Q Annexed to Answering Affidavit of George E. Warren*

made; and the said citation having been returned with proof of due service by publication and mailing pursuant to said order upon the several persons therein named, and with due proof of personal service upon all the other persons interested in the estate of said decedent and named in said petition, except Clara Schwarz, formerly Clara Sielcken; and said Clara Schwarz having duly appeared herein by Davies, Auerbach & Cornell, Esqs., her attorneys, with a written author-
1835 ization for such appearance duly signed and acknowledged by the said Clara Schwarz pursuant to statute, and all the parties so cited being now in default and having failed to appear herein in person or by attorney, except the said Clara Schwarz, and the following other parties who have appeared herein by attorney, namely:

The Woolson Spice Company, which has appeared herein by Wise & Seligsberg, Esqs., its attorneys; and

Marguerite A. Blackwell, who has appeared herein by Niles & Johnson, Esqs., her attorneys;

And the executor's account under oath, with vouchers in support thereof, having been filed in this Court
1836 with its said petition for the settlement thereof;

And the said Woolson Spice Company having filed an instrument in the form of an objection to the account, not objecting to any specific item in the account, but praying that the decree to be entered herein shall direct that the sum of $1,540,000 be retained and set aside by the Executor to meet any judgment, interest and costs which may be ultimately recovered by the said Woolson Spice Company in its action pending against the Executor; and the said Marguerite A. Blackwell having obtained an order to show cause, dated May 4th, 1922, made by Hon. James A. Foley, Surrogate, requiring the Executor to show cause why said Executor and said Clara Schwarz should not be restrained, enjoined and stayed from taking any proceedings of any kind or character in this accounting until after the trial, hearing and determination by the Supreme Court of the

1837

action instituted by said Marguerite A. Blackwell against the said Executor, which action is now pending; and the motion on said order to show cause coming on to be heard before this Court on May 9th, 1922, and the hearing upon said petition and account of the Executor herein coming on to be heard at the same time; and the said motion for a stay having been denied, and an order having been duly made thereon on May 29th, 1922, and entered May 31st, 1922, denying said motion for a stay and further providing that the decree to be entered in this accounting proceeding should provide that the Executor retain all of the assets of the estate now in its hands, less administration expenses properly deductible, with leave to both parties to apply at the foot thereof on notice for any proper modification, and also to contain a provision that the settlement of the accounts of the Executor shall not in any way confirm or ratify payments made to the widow, nor prejudice the Woolson Spice Company and Marguerite A. Blackwell in any future attempts to surcharge the Executor for erroneous payments if any have been made, and further ordering that no further distribution of the assets of this estate is to be made until the further order of this Court; and the proceeding upon said petition and account having duly marked for a decree; and no objection to the account having been filed except the above-mentioned so-called objection of the Woolson Spice Company;

1838

1839

And upon reading and filing the affidavit of George E. Warren, verified March 15th, 1922; the affidavit of Leonard B. Smith, verified March 24th, 1922; the affidavit of Edward Cornell, verified March 22nd, 1922; the affidavit of Frank H. Stewart, verified March 20th, 1922, the affidavit of John D. Fearhake, verified March 16th, 1922; the affidavit of Bernard Rosenthal, verified March 17th, 1922; the affidavit of David Drechsler, verified March 15th, 1922; the affidavit of Hans H. A. Meyn, verified March 24th, 1922; the agreement of renunciation dated August 31st, 1921, duly executed and ac-

knowledged by the Josephinen Heim, one of the legatees named in the will of said decedent; and the agreement dated March 29th, 1920, between Gustav Diederichson, Georg Georgius, Carl Isenberg and Richard Isenberg, the German executors of the will of said decedent, parties of the first part, said Columbia Trust Company, as American Executor of said will, party of the second part, and Clara Sielcken, the widow and residuary legatee under said will, party of the third part, duly executed and acknowledged by said parties respectively;

Now Therefore upon motion of Smith & Agate, attorneys for the said Executor, the said Surrogate, after having examined the said account, now finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof, made by the said Surrogate, as judicially settled and adjusted by him, to be recorded with and taken to be a part of the decree in this proceeding, to wit:

Summary Statement of the account of the Columbia Trust Company, as Executor of the will of Hermann Sielcken, deceased, extending from the 28th day of February, 1919, the date of the last accounting, to and including the 31st day of December, 1921, made by the Surrogate as judicially settled and allowed:

CASH

The executor is charged with the cash set forth in Schedule 1	$2,892,076.92	
With cash received as shown in Schedule 2		
Principal	1,532,787.88	
Income	309,195.12	
		$4,734,059.92

Exhibit Q Annexed to Answering Affidavit of George E. Warren 1843

The executor is credited with cash paid out as shown in the following Schedules:		
Schedule 3	$ 65,441.45	
Schedule 4	421,140.41	
Schedule 5	2,267,816.06	
Schedule 5 (a)	2,672.36	
Schedule 6	1,649,425.00	
		1844
		4,406,495.28
Balance cash on Hand		$ 327,564.64

ASSETS

The executor is charged with the amount of Schedule 1,	4,173,614.22	
With income as shown in Schedule 2,	309,195.12	
With interest charged to customers but not collected as shown in Schedule 2 (a)	6,945.65	$4,489,754.99 1845
The executor is credited with the following Schedules:		
Schedule 3	65,441.45	
Schedule 4	421,140.41	
Schedule 6	1,649,425.00	
Schedule 7	58,342.30	
Schedule 9	2,394.46	
Schedule 9 (a)	2,572.11	$2,199,315.73
Balance of Assets now on hand as shown in Schedule 12		$2,290,439.26

1846 *Exhibit Q Annexed to Answering Affidavit of George E. Warren*

Subject to alleged claims against the estate as shown in Schedule 10, and to Executor's commissions as shown in Schedule 13, and taxes and other expenses of administration, with which said balance the Executor is hereby charged as of the said 31st day of December, 1921.

And, it appearing that the Executor has fully accounted for all the moneys and personal property of the estate of said decedent which came to its hand as
1847 such Executor, down to the said 31st day of December, 1921, and its account having been adjusted by the said Surrogate and a summary statement of the same having been made, as above and hereby recorded;

It Is Ordered, Adjudged and Decreed, that the said account be, and the same hereby is, judicially settled and allowed as filed and adjusted;

And It Is Further Ordered, Adjudged and Decreed, that out of the moneys remaining in its hands, the Executor retain the sum of Sixteen thousand three hundred and forty-one ($16,341) Dollars, for the commissions to which it is entitled on this accounting, as specified in Schedule 13 (thirteen) of said account;

1848 And It Is Further Ordered, Adjudged and Decreed, that all the assets and personal property that belonged to said decedent's estate on the said 31st day of December, 1921, after deducting the amount of the commissions above set forth, are chargeable as hereinbefore adjudged to the said executor for further administration;

And It Is Further Ordered, Adjudged and Decreed, that out of the assets so remaining in its hands, said Executor retain and set aside the sum of One million five hundred and forty thousand ($1,540,000) Dollars, to meet any judgment which may be ultimately recovered by the said Woolson Spice Company, in its action in the Supreme Court, now pending against the said Executor;

And It Is Further Ordered, Adjudged and Decreed, that the said Executor retain and set aside all the assets in its hands remaining after complying with the fore-

Exhibit Q Annexed to Answering Affidavit of George E. Warren 1849

going provisions of this decree, less administration expenses properly deductible, to meet any judgment which may be ultimately recovered by said Marguerite A. Blackwell, in her action in the Supreme Court, now pending against the said Executor;

And It Is Further Ordered, Adjudged and Decreed, that as against the said Woolson Spice Company and the said Marguerite A. Blackwell, this decree and the settlement of the Executor's account herein provided for, shall not in any way confirm or ratify payments made by 1850
said Executor to Clara Schwarz, formerly Clara Sielcken, the widow and residuary legatee of said decedent, nor prejudice the said Woolson Spice Company and Marguerite A. Blackwell, or either of them, in any future attempts to surcharge the Executor for erroneous payments to the said widow, if any have been made;

And It Is Further Ordered, Adjudged and Decreed, that no further distribution of the assets of this estate is to be made until the further order of the Court;

And It Is Further Ordered, Adjudged and Decreed, that leave is hereby given to the said Columbia Trust Company, as Executor as aforesaid, to said Woolson Spice Company and to said Marguerite A. Blackwell, 1851
or any one or more of them to apply at any time hereafter at the foot of this decree on notice for any proper modification of any provision or provisions of the four paragraphs of this decree last above contained herein;

And It Is Further Ordered, Adjudged and Decreed, that the said Executor, upon complying with the directions herein contained, shall be fully freed and discharged from all liability, claim and demand as to the matters included in the said account.

JAMES A. FOLEY,
Surrogate.

Exhibit R Annexed to Answering Affidavit of George E. Warren.

This exhibit is a copy of Exhibit E of Petition for Leave to Intervene, printed above on page 353.

1852 **Exhibit S Annexed to Answering Affidavit of George E. Warren.**

December 17, 1917.

Joseph A. Bower, Esq., Manager
Business Department,
Enemy Alien Custodian
120 Broadway, New York City.

My dear Mr. Bower:

We have received a copy of the "Frankfurter Zei-
1853 tung," a daily newspaper published in Frankfurt, Germany, dated October 11, 1917, containing a formal notice of the death of Hermann Sielcken, who died on October 8th, 1917.

The Columbia Trust Company is in possession of a will signed by Mr. Sielcken in which it is named as executor, and which we are now advised by counsel should be filed for probate. In view of the fact that this apparently alters the situation as regards the assets of the firm of Crossman & Sielcken, it will become necessary for the executor to account for the estate as of the date of Mr. Sielcken's death, October 8th, 1917, and to open
1854 up a set of books as of that date.

Do you not think it would be possible for the Alien Enemy Custodian to permit the turning over of the assets of Crossman & Sielcken to us as executor when the will is admitted to probate. We can then proceed to account for the value of the estate as of October 8th, the date of Mr. Sielcken's death, bring proceedings for the determination of the New York State Inheritance Tax, the Federal Inheritance Tax, liquidating any claims due to American citizens, and be prepared to hold for account of or turn over to the Alien Enemy Custodian, such proportion of the estate as belongs to alien enemies.

Awaiting your further advices or instructions, I am

Yours respectfully,

GW
Vice-President.

gew.dw.

Exhibit T Annexed to Answering Affidavit of George E. Warren. 1855

A. P. C. 197

In replying address only
The Alien Property Custodian
and Refer to No.

2281

ALIEN PROPERTY CUSTODIAN

SIXTEENTH AND P STREETS NW.

Washington, D. C.

April 1, 1921. 1856

(G.E.W.)

Re: Report No. 17412
Estate of Herman Sielcken

Columbia Trust Co.,
60 Broadway,
New York, N. Y.

Gentlemen:

On March 18th, 1918 you executed and forwarded to this office a report as executor under the Will of Herman Sielcken, deceased. This report was filed in this office March 19th, 1918, and given the report number as above. This report showed the following enemy interest in this estate: 1857

Name	Address
(Gustav Diederichsen	Germany
(Heinrich Diederichsen	do
(Carl Isenberg	do
(Richard Isenberg	do

German executors under the Will of Herman Sielcken

Henrich Seidel	Baden-Baden, Gy.
Lina Kraft	" "
City of Baden	" "
Josephine Heim Hospital	" "
Clara Sielcken	" "

1858 *Exhibit T Annexed to Answering Affidavit of George E. Warren*

On September 27th, 1918, the Custodian issued a demand, service of which you accepted October 25th, 1918 which demand called for the delivery to the Custodian of the interest of the above named enemies in the estate when the same should be ascertained.

This demand carried but one trust number, that is trust No. 1 which on the records of the office of the Alien Property Custodian is the trust number assigned Herman Sielcken. For the purpose of correcting our
1859 records it became necessary that separate trust numbers should be assigned the individual interests. The trust numbers assigned are as follows:

German executors — Trust No. 46815

In the correspondence of the Alien Property Custodian the word "enemy" is used as meaning "enemy" or "ally of enemy," as defined by the Trading with the enemy Act.

Columbia Trust Co. 4/1/21

Heinrich Seidel	Trust No.	46816
Lina Kraft	" "	46817
1860 City of Baden	" "	46818
Josephine Heim Hospital	" "	46819
Clara Sielcken	" "	12604

Will you therefore avoid the necessity of issuing supplemental demands by correcting on your copy of the demand the trust numbers so that the individual interest will carry the trust number above listed rather than a general trust No. 1. The Custodian may possibly issue a supplemental demand covering the interest of the chief gardener Brinkmann which interest was not heretofore demanded.

The claim filed by you for the release to you of property now held by the Alien Property Custodian will close out upon our books Trust No. 1, and the claim filed by Clara Sielcken for the release of property held in her

Exhibit T Annexed to Answering Affidavit of George E. Warren

name will close out our Trust No. 12604. There will then remain upon our books the outstanding demands in the remaining trusts above listed, which will be closed when distribution is made.

We should be glad to have you advise when you have made the changes upon the copy of the demand left with you and upon your records.

Very truly yours,

H. B. CATON
Director, Bureau of Trusts.

HBC:CK

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CLERK'S COPY.

TRANSCRIPT OF RECORD

(IN TWO VOLUMES)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 75

ROBERT H. JACKSON, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES, AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

vs.

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

VOLUME 2

PETITION FOR CERTIORARI FILED MAY 11, 1940
CERTIORARI GRANTED JUNE 3, 1940

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

vs.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL EINKAUFS GESELLSCHAFT, m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of Hermann Sielcken, Deceased,
Intervenor in Proceeding to Vacate, Appellant, and Respondent on Cross-Appeal.

THE ATTORNEY-GENERAL OF THE UNITED STATES, on behalf of the United States and as successor to the Alien Property Custodian,
Respondent and Cross-Appellant.

THE UNITED STATES OF AMERICA,
Respondent.

JOHN S. SORENSON,
Defendant-Respondent.

RECORD ON APPEAL AND CROSS-APPEAL.

1864 **Answering Affidavit of John F. McIlwain.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
1865 HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

Equity No. 44-28.

In Proceedings to Vacate Final Decree of December 30, 1929.

State of New York,
County of New York, ss:

1866 John F. McIlwain, being duly sworn, deposes and says:

That he resides at 18 South Road, Harrison, New York.

That he has been connected with the Trust Department of the Irving Trust Company since 1926, which at the time bore the name of American Exchange-Irving Trust Company and which is the same corporation which was formerly named Columbia Trust Company and was appointed executor herein of Hermann Sielcken, deceased, in January 1918.

That up to May 1933 deponent had no special connection whatever with the estate of Hermann Sielcken, deceased, but when Mr. Orrin R. Judd retired from the Trust Company about May 1933 deponent was put in immediate charge of the affairs of administration of the

estate of Hermann Sielcken. Mr. Paul E. Mead, who is now absent from the State, came in, in 1935, and since that time he has had general supervision of the affairs of that estate, he being the head of the Trust Department.

At the time when deponent took hold of the affairs of the estate, there was a large amount of litigation going on concerning it, in which the Trust Company was represented by Mr. Leonard B. Smith and Mr. Selden Bacon, and deponent as far as possible familiarized himself with the general condition of all that litigation. 1868

The collection of the judgment entered in this cause in December, 1929, had occurred about three years before deponent became connected with the matters of the estate, and deponent never attempted to familiarize himself with the details of the earlier proceedings in this Court or before the Mixed Claims Commission which led up to the settlement made in 1930, except to keep track of actual payments received and made by the executor.

The account herein, filed in December 1937 in the Surrogate's Court for the County of New York was prepared by Mr. Bacon with deponent's assistance, and 1869 deponent's knowledge of the receipts in 1930 and thereafter and the disposition made thereof was confined to the entries made on the executor's books in the department and to deponent's actual knowledge of the receipts and disbursements made after May 1933.

From the time in May 1933 when deponent became connected with the affairs of the estate until late 1937, the executor was engaged in heavy litigation against Mrs. Sielcken Schwarz, which was being conducted by a number of attorneys on her part, including Mr. Brainard Avery, Mr. George W. Alger and others, consisting chiefly in a suit instituted by her in Ohio and a proceeding instituted by her in the Surrogate's Court for New York County to vacate the decrees of the Surrogate's Court entered respectively in 1921, 1922 and 1925,

settling and approving the accounts of this executor for this estate.

In view of the fact that Mr. Avery and Mr. Alger and Mr. Avery's partners were acting as attorneys against the executor, it was obviously inadvisable for deponent to attempt to get from them a history of the transactions leading up to the entry of the decree of December 30, 1929 in this Court and the award of the Mixed Claims Commission on the Wille Memorial made in 1930, and deponent never learned until August 1938 of the details
1871 of the proceedings and steps leading up to the settlement of 1930; deponent first learning of those steps from the affidavit of Brainard Avery, verified herein August 11, 1938.

The proceedings in the Surrogate's Court to vacate the said former decrees were terminated only on or about the 30th day of September, 1937, and the Ohio suit some time early in 1938.

Since Mr. Judd left the Irving Trust Company in 1933 there has been no one connected with the Trust Company who had personal knowledge of the details of the history of the administration of the estate. Deponent's principal study of them since that time has been car-
1872 ried out through a study by Mr. Bacon of the records of the Trust Company and in the Courts and in the correspondence of Messrs. Leonard B. Smith, Smith & Agate, Davies, Auerbach & Cornell and others of those prior transactions.

Deponent further says that in preparing the pending account herein in the Surrogate's Court, of which a copy is annexed to the affidavit of Selden Bacon, verified herein, on the 12th day of August, 1938, deponent did not attempt to give any explanation of the settlement that was made in 1930, merely detailing the actual receipts and payments in accordance with the settlement agreement that deponent found among the files of the Irving Trust Company. Deponent at that time had no means of ascertaining how that settlement had been reached or

just how it was reached. There was no one concerned in the account as far as the executor knew who was in any way affected as far as the account was concerned by the method in which that settlement had been reached, the Attorney General having applied to be made a party to that accounting only in January 1938 after the account had been verified and filed. The statements in that account, as to the receipt and disbursement of the sums received by the executor under the decree herein and under the award of the Mixed Claims Commission against Germany impleaded with Theodor Wille were, therefore, intended merely as a statement of actual receipts and disbursements by the executor.

Aside from what is above stated, deponent has never had any detailed knowledge or information concerning the way that settlement of 1930 was brought about and accomplished.

JOHN F. McILWAIN

Subscribed and sworn to before me this
12th day of August, 1938.
James S. Ogsbury, Jr.,
Notary Public,
Nassau Co.

N. Y. No. 1870.
Certificate filed in N .Y. Co. No. 180.
N. Y. County Register's No. 0-O-105.
My commission expires March 30, 1940.
(Seal)

1876 **Answering Affidavit of Orrin R. Judd.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE IN PROCEEDINGS TO VACATE DECREE.]

State of New York,
County of New York, ss:

Orrin R. Judd, being duly sworn, deposes and says:

1877 That from 1925 to the spring of 1935, deponent was a Vice President of the Irving Trust Company, but since 1935 deponent has not been connected therewith.

That during the period from May 1925, when Mr. George E. Warren, a Vice President of the Company, left the Trust Company, deponent was, until he left the Company in 1935, in primary charge for the Irving Trust Company of all matters affecting the administration of the estate of Hermann Sielcken, deceased, and of the Trust Company's administration of the affairs of the former firm of Crossman & Sielcken, and deponent gave constant attention thereto.

1878 That at no time during that period was any claim ever made to this executor or to any one connected with it so far as deponent ever heard, either by the firm of Theodor Wille of Hamburg or by the firm of Theodor Wille of Santos, South America, or any one in their behalf, that either of those firms had any interest whatever in any sum that might be recovered on behalf of the said firm of Crossman & Sielcken from any purchasers of what are known as the "seized cargoes" as to which the above-entitled suit was brought in this Court.

No explanation was ever made to us or reported to me or to the Trust Company of the basis on which the firm of Theodor Wille made a demand in 1930, on the Zentral Einkaufsgesellschaft and the German Agent before the Mixed Claims Commission, for payment of $100,000 as a

condition to its signing various papers required for the settlement of the two claims before the Mixed Claims Commission, and the claim of the Zentral Einkaufsgesellschaft for indemnity, and the payment of the judgment recovered in this suit.

The first I ever heard of that demand was at a time considerably after the entry of the decree herein and, as I recall it, some time in March 1930. At that time I had been informed by Mr. Avery that the negotiations with Dr. von Lewinski, the German Agent, had reached a conclusion that was satisfactory, both to the Zentral 1880
Einkaufsgesellschaft and to Mrs. Sielcken Schwarz but that after such agreement had been reached in theory, which included also the settlement of the claim made by the Memorial filed against Wille, Dr. von Lewinski had stated that he was having difficulty about obtaining the required releases from Theodor Wille.

After some negotiations, as I was informed by Mr. Avery, the German Agent had advised Mr. Avery that Theodor Wille would sign the releases if they got $100,000, and that the Zentral Einkaufsgesellschaft would contribute one half of that amount if the claimants would contribute the other half.

It was pointed out to me that what that amounted 1881
to, as far as we were concerned, was simply a deduction from the amount that we would get under the agreed award against Wille; that he, Avery, and his associates and Mrs. Sielcken Schwarz all regarded the general settlement as so advantageous that they were willing to consent to that payment to Wille rather than have the settlement fail; that the sum coming to us, even after that deduction, would be considerably more than the $1,000,000 Mrs. Sielcken Schwarz had given her attorneys authority to settle for.

The compromise by which about $360,000 was paid to the Zentral Einkaufsgesellschaft was merely a compromise of the claim advanced to us by Zentral Einkaufsgesellschaft that they held an indemnity agreement, executed

by the German Executors of the late Hermann Sielcken, to the effect that in case the firm of Crossman & Sielcken recovered anything from the Zentral Einkaufsgesellschaft on account of the cargoes involved in this suit, the German Executors would reimburse the Zentral Einkaufsgesellschaft any amount so recovered and indemnify them against any consequent loss. We had a copy of that agreement, and the sole defense to it that we were advised of was the claim we had already advanced before the Mixed Claims Commission, that that agreement was invalid by reason of the double position held in the matter by the German Executors who had signed that indemnity agreement, in consequence of which their own personal interests were involved in that agreement in opposition to the interests of the estate.

The individual estate of Hermann Sielcken in Germany had been valued by the United States Government, in connection with the Estate Tax on said Sielcken's American estate, at $1,171,771.74, of which nearly a half consisted of real estate in Baden, Germany; and as Mrs. Sielcken Schwarz was the residuary legatee of the entire estate of Hermann Sielcken (both that in the United States and that in Germany), it was not of moment to her whether any payment under that indemnity agreement was paid out of the assets of Sielcken's estate in Germany or out of the assets belonging to his estate in this country.

In the judgment of all of us, the compromise of that claim for indemnity at fifty per cent was a distinctly advantageous one to the estate, as we very much dreaded the attitude the German Courts might take with regard to that indemnity agreement, although it seemed to our counsel that under our own law the agreement would be held invalid, and the expense of litigation there would be great.

It was pointed out to me at the time that any claim under that indemnity agreement would naturally be prosecuted in the Courts of Germany where all the par-

ties to that indemnity agreement resided. We had and had filed with the Mixed Claims Commission an opinion of an eminent German lawyer, Dr. Neumann, that the indemnity contract was void under German law. But unquestionably the point was one of extreme difficulty and both sides so regarded it. We feared the outcome of such a case in the German Courts. Under those circumstances, the compromise at fifty per cent seemed to us reasonable and desirable, as the terms of the compromise, including the payment of the $50,000 for Wille, were approved by Mrs. Sielcken Schwarz before the 1886
compromise was finally agreed to by us.

The payment made to Zentral Einkaufsgesellschaft was not a division of the recovery from the United States under the decree in this suit under any claim by it to be entitled to any part of that recovery, but a payment in compromise of that counterclaim for indemnity.

The payments for purposes of immediate closing were made out of those particular funds, which were immediately available instead of awaiting the receipt of other funds by the estate, which came in in adequate amount only a few weeks later.

ORRIN R. JUDD. 1887

Subscribed and sworn to before me this.
30th day of July, 1938.
James S. Ogsbury, Jr.,
Notary Public,
Nassau Co.
N. Y. No. 1870.
Certificate filed in N. Y. Co., No. 180.
N. Y. County Register's No. 0-O-105.
My Commission expires March 30, 1940.
(Seal)

1888

Answering Affidavit of Selden Bacon.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE IN PROCEEDINGS TO VACATE DECREE.]

State of New York,
County of New York, ss:

1889

Selden Bacon, being duly sworn, deposes and says:

I was retained as special counsel in connection with matters affecting the Sielcken estate by the Irving Trust Company as Executor of Hermann Sielcken, deceased, about the 1st of November, 1931, at first in connection with a suit that had been instituted by the Chase National Bank as executor of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, Clara Sielcken Schwarz and the Irving Trust Company as executor of Hermann Sielcken, deceased, and other nominal defendants who had never been served, and also in connection with a proposed suit, later instituted by Mrs. Clara Sielcken Schwarz in the Court of Common Pleas for Lucas County, Ohio,

1890

against the Woolson Spice Company and a number of other individual defendants and the Irving Trust Company as such executor, seeking to vacate a sale of shares of the Woolson Spice Company stock that had been made by the Irving Trust Company as such executor in 1918.

From time to time afterwards deponent was engaged (as such special counsel in each case) jointly with Mr. Leonard B. Smith (who had been the regular counsel for the executor many years previous) to attend to other litigation, and particularly to the proceedings brought in the Surrogate's Court by Mrs. Sielcken Schwarz in 1932 to vacate three decrees of the Surrogate's Court approving accounts of the Irving Trust Company as executor, which decrees had been entered respectively in 1921, 1922 and 1925; also in connection with various tax

proceedings and other suits; and later in preparing and submitting the pending accounting of the Executor in the said Surrogate's Court, of which account a true and correct copy is hereto annexed, marked Exhibit A, and hereby made a part of this affidavit.

Deponent further says that in all such preceding litigation, and during the preparation of the said account, deponent had never had occasion to examine minutely into the proceedings conducted in 1927 to 1930 before the Mixed Claims Commission and in the above entitled suit in this Court, although deponent had been familiar 1892
with the Memorials and answers before the Mixed Claims Commission and the pleadings and decree in the above entitled suit, so far as germane to said proceedings in which deponent was retained; and in preparing such account deponent gave the financial figures of the actual disposition and distribution made of the sums recovered under the decree in this suit and under the award of the Mixed Claims Commission under the so-called Wille Memorial (of which copy is hereto annexed, marked Exhibit B, and hereby made a part of this affidavit), but without examining into the origin and nature of the facts occasioning the particular distribution made, all of which had occurred more than a year prior to deponent's 1893
first connection with the estate.

Deponent further says that he annexes hereto also a copy of the answer to the 1927 Wille Memorial that was filed by Germany (without the exhibits thereto), marked Exhibit C, and hereby made a part of this affidavit.

Until the present motion was noticed deponent never had occasion to inquire into the exact nature and details of the compromise agreement under which such payments were made.

From May 1933 on, there has been no one connected with the Trust Company who had had any detailed knowledge of that settlement, and from 1932 on deponent had been opposed to Mrs. Clara Sielcken Schwarz and the various attorneys whom she had employed in

connection with the presentation and settlement of the said claims and this suit, both in the said Toledo suit and in the said proceedings to vacate the said decrees, both of which were very complicated and prolonged and stoutly litigated, and which were finally disposed of, one in late 1937 and the other in 1938. During all that period deponent naturally was unable to consult with the attorneys who had been employed by and represented Mrs. Sielcken and represented nominally the executor and the surviving partners in the two
1895 Memorials, and the plaintiffs in this suit, concerning any details which could in any way affect the other very complicated litigation in which deponent was directly opposed to them; and it is only since the present motion was first noticed by the United States that deponent has been able to inquire of them into the very complicated details of the prosecution and settlement of those Memorials and of this suit. Under those conditions, in preparing the said pending account in late 1937, deponent made no attempt to state the details of any of those proceedings beyond the mere financial set-up, showing the executor's receipts and disbursements, beyond which no statement was necessary in the accounting proceeding as
1896 to any of the parties originally cited thereto.

Neither the Attorney General nor the Alien Property Custodian nor the Treasurer of the United States nor the United States were any of them cited to attend that accounting or believed to have any interest therein.

In January, 1938, however, the Attorney General of the United States as successor to the Alien Property Custodian applied to intervene as a party to that accounting, claiming that he had, in January, 1938 vacated the 1921 release of the share of Mrs. Sielcken Schwarz as residuary legatee of Hermann Sielcken, deceased, under said Sielcken's will and that he was in consequence entitled to receive her share, a matter as yet undisposed of beyond the admission of the Attorney General as a party to that accounting proceeding.

Since the Irving Trust Company was allowed to intervene in this present proceeding, deponent has very carefully familiarized himself with all the proceedings had and has talked at length with Mr. Brainard Avery, Mr. Richard S. Doyle, and less at length with Hon. Charles D. Hamel, who, except for Mr. Barnes, who is dead, and Mr. George W. Alger who is abroad, were the principal attorneys for the plaintiffs in this cause as well as for the claimants in the said Wille and Zentral Einkaufsgesellschaft Memorials of 1927.

Owing to Mr. Alger's unexpected departure for Europe, deponent has not discussed the matter with him personally, though deponent is informed by Mr. Avery that Mr. Avery had, at deponent's suggestion, discussed the matter at considerable length with Mr. Alger, whose recollection conformed to that of Mr. Avery.

Deponent was informed by Mr. Avery during July that Mr. Alger was ready to make an affidavit; but Mr. Alger departed suddenly from the country on July 30th, 1938, without prior notice to deponent that he was going and will not return to the country until about the first day of September. Deponent, on behalf of the Irving Trust Company (for whom he is acting as solicitor and counsel) will desire to submit an affidavit by Mr. Alger which will be, as deponent is informed and believes, substantially along the lines of the affidavits of Mr. Brainard Avery and Mr. Richard S. Doyle in so far as Mr. Alger was connected with the matter, and deponent asks leave to submit such an affidavit promptly after Mr. Alger's return to the country.

Deponent further says that he annexes hereto a copy of the award made by the Mixed Claims Commission under the Wille Memorial of 1927, marked Exhibit D hereof, and made a part hereof; that the amount actually awarded as stated by the United States Treasurer to the Irving Trust Company, was principal $558,827.85 and interest to January 1st, 1928, $272,524.27, making a total of $831,352.12, as of January 1st, 1928.

1900 *Answering Affidavit of Selden Bacon*

Deponent further, on behalf of the Irving Trust Company, presents for hearing on this motion the files in this cause including the pleadings, the decree, the stenographer's minutes of the trial of this case before this Court, the two opinions of the Court therein, and the order to show cause why the Irving Trust Company should not be permitted to intervene on this motion, and the affidavits and sworn petition on which that order was granted, copies of which were served on the Attorney for the United States herein on the 16th day of June, 1938, and also the affidavits of Messrs. George E. Warren, Brainard Avery, Orrin R. Judd, Richard S. Doyle, Frederick Wirth, Jr., William Abramson, George O. Castell, Leonard B. Smith, John F. McIlwain and Charles D. Hamel as explaining the situation which the moving affidavits have so misrepresented to the Court, although apparently without reference to the nature of the motion made, which is simply on the ground that this Court was without jurisdiction to enter the decree herein of December 30, 1929, without specifying in any way in what respect it is claimed such lack of jurisdiction existed.

1901

Deponent further says that he has talked with Mr. John S. Sorenson, the surviving plaintiff in this cause, Mr. Nielsen having died nearly eight years ago without deponent's ever having seen him. Mr. Sorenson has refused to make any affidavit beyond that already filed by him in this cause in his own behalf; but prior to such refusal said Sorenson had informed deponent that both he and Nielsen, at the time of bringing this suit, believed that all claim of Theodor Wille to any interest in any recovery that might be had herein had been settled and abandoned by Wille prior to 1924, and believed that said firm of Theodor Wille at the time this suit was brought and of filing the Memorial against Z.E.G. in 1927 had no interest whatever in any recovery therein or thereunder; and that both he and said Nielsen were advised and believed that they were the proper parties plaintiff in this suit to assert a claim of the former part-

1902

nership of Crossman & Sielcken, of which they were in 1927 the sole surviving members, and deponent believes these statements made to him by Mr. Sorenson to be true.

Deponent further says that the fact that any and all such claim of Theodor Wille had been wiped out prior to 1924 by a settlement made with that firm by Mrs. Clara Sielcken Schwarz, the residuary legatee, is confirmed by the entry on the books of the firm of Crossman & Sielcken which are in deponent's actual possession and with which deponent is familiar, charging off the balance of the claim against Theodor Wille which in 1917 had been supposed to exist against Wille by reason of the loss of said cargoes, to Profit and Loss in February 1924; as well as by a letter in deponent's possession written at that time by Mr. Sorenson to Mr. Leonard B. Smith (deponent's associate solicitor herein), in March 1924, advising that such charge to Profit and Loss had been made on the books of the firm. 1904

Deponent further says that he is informed by documents now in the possession of deponent that Mr. Thomas E. Rhodes, the Assistant Attorney General who appeared for the United States Treasurer and the Alien Property Custodian as counsel at the trial of this suit, made in March 1930 a report to the Solicitor General of the United States concerning possible appeal from the decree of December 30th, 1929, herein, advising that no appeal be taken, and that that report was approved by the Solicitor General. 1905

That during July, 1938, deponent had several conferences, either personally or by telephone, with Mr. McNamara, an Assistant Attorney General of the United States, who has appeared on this motion, with regard to the production of papers herein for inspection. Deponent told Mr. McNamara that the Trust Company had nothing to conceal in this matter, and that deponent would advise it to allow the Attorney General or his representatives to see any relevant papers in the Trust Company's possession relating to the questions involved in the present

motion, but that before deciding to do so deponent desired to consult his client, which deponent did, and then advised Mr. McNamara that the Irving Trust Company thought there should be some reciprocity in the matter of examining papers before allowing a general inspection, and Mr. McNamara then advised deponent that he would not make any promises or accede to any conditions of his examining papers in the matter in deponent's custody, but suggested that deponent write him for such papers as the Trust Company desired to see, and stated
1907 expressly that he would decline to make production of such papers by the Attorney General's office a condition for obtaining inspection of papers in the possession of the Trust Company.

The only specific papers Mr. McNamara stated he wished to see were papers to copies of which he already had access, as deponent pointed out to him.

In response to Mr. McNamara's suggestion, on the 21st of July, 1938, deponent sent a letter to the Attorney General of the United States, marked for attention of Mr. McNamara, of which a copy is hereto annexed and marked Exhibit E. In reply, on or about the 24th of July, 1938, deponent received a letter from the Depart-
1908 ment of Justice, of which a copy is hereto annexed, marked Exhibit F.

Deponent has had no further word from the Department of Justice on the subject of being afforded copies of these papers, which are, directly material to the issues attempted to be raised by the moving papers herein.

Deponent further says that the whole matter of the Memorials before the Mixed Claims Commission and the recovery of the decree herein and payment thereof, and the compromise arrangement of the matter were all concluded more than a year before deponent was in any way connected with the affairs of this estate, but that deponent has carefully examined the documents in the case in possession of the executor and a large part of the files of the Mixed Claims Commission, and from-

those files and documents and deponent's careful questioning of Messrs. Brainard Avery, Doyle and Hamel, and such other information as deponent has been able to secure, deponent believes the account given by Mr. Avery in his affidavit herein, verified August 11, 1938, of the situation in regard to that compromise to be correct.

SELDEN BACON.

Subscribed and sworn to before
me this 12th day of August, 1938.
James S. Ogsbury, Jr.,
Notary Public,
Nassau Co., N. Y. No. 1870.
Certificate filed in N. Y. Co., No. 480.
N. Y. County Register's No. 0-O-105.
My Commission expires March 30, 1940.

(Seal)

1912 **Exhibit A Annexed to Answering Affidavit of Selden Bacon.**

SURROGATES' COURT,

COUNTY OF NEW YORK.

IN THE MATTER of The Judicial Settlement of the Account of Proceedings of IRVING TRUST COMPANY as Executor of HERMANN SIELCKEN, Deceased.	INTERMEDIATE ACCOUNT OF PROCEEDINGS OF EXECUTOR. FILE NO. No.

1913

TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK:

The undersigned IRVING TRUST COMPANY doth render the following intermediate account of its proceedings as Executor of Hermann Sielcken, deceased, from the 18th day of March, 1927, to the 1st day of December, 1937.

Deceased died a resident of Baden-Baden, in Baden, Germany, on the 8th day of October, 1917.

1914 On the 26th day of January, 1918, Letters Testamentary under his will were issued to the Irving Trust Company (under its former name, Columbia Trust Company).

On the 24th day of June, 1919, the Executor filed in the Surrogate's Court of the County of New York, an account extending from the date of its appointment to the 28th day of February, 1919. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated July 7th, 1921, and filed in the office of the Clerk of said Court on the 8th day of July, 1921.

On the 28th day of March, 1922, the Executor filed in said Surrogate's Court a second account extending from the 28th day of February, 1919, the date of its previous accounting, to and including the 31st day of December, 1921. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated July 11th, 1922, and filed in the office of the Clerk of said Court on the 13th day of July, 1922.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

On the 30th day of January, 1925, the Executor filed in said Surrogate's Court a third account extending from the 31st day of December, 1921, the date of its last previous accounting, to and including the 14th day of January, 1925. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated and filed in the office of the Clerk of said Court on February 9th, 1925.

As of the 18th day of March, 1927, the Executor rendered a voluntary extra judicial account to the residuary legatee, then the sole person interested in the estate, of which a copy is hereto annexed as Exhibit 1 of Schedule K of this account. Said voluntary account was thereafter approved by the Supreme Court for the State of New York by judgment entered in the office of the clerk of the County of New York on the 8th day of November, 1937, in an action in which an account of the partnership of Crossman & Sielcken was ordered by decree of that court of November 11, 1933, in which said voluntary account was set forth in full as part of that accounting. Such accounting was rendered in an action entitled Chase National Bank of the City of New York as ancillary executor of Thorleif S. B. Nielsen against John S. Sorenson, Clara Sielcken Schwarz and this executor and others, defendants.

The New York transfer tax on this estate was fixed by orders of this Court dated respectively the 21st day of November, 1919 and the 27th day of November 1923, and was fully paid prior to 1924, as shown in the prior accountings of this executor.

SCHEDULE A, hereto annexed, contains an itemized statement of all moneys and other property (including any item reported in Schedule B-1 as uncollectible) belonging to the estate or fund, which have come into its hands or which have been received by any person for it or on its behalf as such Executor from its last accounting as of the 18th day of March, 1927, (including balance then on hand) to and including the 1st day of December, 1937.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

SCHEDULE A-1, hereto annexed, contains a full and complete statement of all increment to the capital of the estate whether derived from increases due to sale, liquidation, distribution of capital dividends, distribution to legatees or distributees at values in excess of values stated in Schedule A or in any other manner since the last accounting as of March 18th, 1927. In each instance the date of realization of the increment and the amount thereof is given and the property from which the increment was derived is identified as far as may be with the property listed in Schedule A.

SCHEDULE A-2, hereto annexed, contains a full and complete statement of all income received during this accounting period of the administration, (March 18th, 1927 to December 1st, 1937), together with a statement of the source, the date and the amount of each receipt.

SCHEDULE A-3, hereto annexed, contains a statement of Refunding bonds now held by the Executor executed by the Residuary Legatee and of the security given by her therefor.

SCHEDULE B, hereto annexed, contains a full and complete statement of all decreases in the quantity or the value of the assets of the estate together with a statement of the cause of such decrease or loss of assets or of value and whether the decrease or loss has been actually realized and, if so, the date of realization and whether it arose by reason of a sale, liquidation, physical loss, physical damage or any other reason since the last accounting as of March 18th, 1927.

SCHEDULE B-1, hereto annexed, contains a full and complete statement of all debts due to deceased and of all rights of property enuring to the benefit of deceased which are listed in Schedules A, A-1 and A-3 and which have not been collected and are not collectible by it together with a statement of the reason for such non-collection.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

SCHEDULE C, hereto annexed, contains an itemized statement of all moneys paid by it for administration, funeral and other necessary expenses for said estate, together with the reason and object of each such expenditure and the date of each such payment, since its last accounting as of March 18th, 1927.

SCHEDULE C-1, hereto annexed, contains an itemized statement of all unpaid undisputed claims for administration, funeral and other necessary expenses for said estate, together with a statement of the nature of each such claim.

SCHEDULE D, hereto annexed, contains an itemized statement of all claims of creditors presented to this executor or which have come to its knowledge, together with a statement whether any right of preference exists in respect of such claims and the claimed basis to such right, if any.

SCHEDULE D-1, hereto annexed, contains a statement of claims upon which judgment or decree has been rendered against your accountant since the date of its last accounting, March 18th, 1927, together with the names of the claimants, the general nature of the claim sued upon, the amount of the judgment rendered, the name of the court in which it was rendered, and the date of the entry of the judgment.

SCHEDULE D-2, hereto annexed, contains an itemized statement of the personal claims, if any, of the accounting party payable only after proof to and allowance by the Surrogate pursuant to Section 212 of the Surrogate's Court Act, paid since the last accounting, as of March 18th, 1927. Any payment made without prior allowance by the Surrogate is separately listed and the reason for such unauthorized payment stated.

1924 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE D-3, hereto annexed, contains a statement of claims which have been presented during the administration of the estate since March 18th, 1927 and which have been disputed or rejected by this executor together with the reason for such rejection.

SCHEDULE E, hereto annexed, contains a full and complete statement of all claims of creditors presented to, allowed and paid by the executor, since its last accounting as of March 18th, 1927, together with the names
1925 of the claimants, the general nature of the claim, the date of payment, the amount actually paid to the creditor and whether any right of preference exists or is asserted.

SCHEDULE F, hereto annexed, contains an itemized statement of all moneys paid and of property delivered to the legatees, trustees, surviving spouse or distributees of the deceased since its last accounting, as of March 18th, 1927, and the date of payment or delivery thereof and the name of the person to whom payment or delivery was actually made.

1926

SCHEDULE G, hereto annexed, contains an itemized statement showing all property remaining in the hands of your accountant, including a statement of all uncollected debts, credits, receivables and property rights due either to deceased or to the estate as of the 1st day of December, 1937, the last day of the account as set forth above.

SCHEDULE H, hereto annexed, contains the names of all persons entitled as legatee, trustee, surviving spouse, devisee, distributee or otherwise to a share of the estate or fund, with their post office addresses and the degree of relationship of each to the deceased; a statement showing the nature of and the value or approximate value of the interest of each such person; a statement listing separately each person so interested in the estate who

1927

is an infant or an incompetent and, in the case of each infant, listing the name of his father, mother, guardian or the person with whom he resides and, in the case of each incompetent, listing the name of his committee and the post office address of the committee so far as known; a statement that the records of this court have been searched for powers of attorney and assignments and encumbrances made and executed by any of the persons interested in or entitled to a share of the estate and a list detailing each power of attorney, assignment and encumbrance disclosed by such search with the date of its record and the name and address of each attorney in fact and of each assignee and of each person beneficially interested under the encumbrance referred to in the respective instruments, and also whether the accounting party has any knowledge of the execution of any such power of attorney or assignment Not so filed and recorded.

1928

SCHEDULE I, hereto annexed, contains a statement showing all estate taxes assessed and paid by it upon or in respect of any property required to be included in the gross estate of the decedent under the provisions of the Tax Law or under the provisions of any United States Revenue Act, since March 18th, 1927, the date of this executor's last accounting.

1929

This schedule also contains a computation setting forth the proposed allocation of taxes paid and to be paid and the amounts due the estate from each person in whose behalf a tax payment has been made and also the proportionate amount of the tax paid by each of the named persons interested in this estate or charged against their respective interests, as provided in Section 124 of the Decedent Estate Law.

SCHEDULE J, hereto annexed, contains a computation of the amount of commissions due upon this accounting. This schedule conforms to the directions contained in the Rules of the Surrogate's Court, New York County.

1930 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE K, hereto annexed, contains a statement of all other facts affecting the administration of said estate or fund and the rights of those interested therein.

This schedule contains the information required by Rule X, subdivision 7, Rules of the Surrogate's Court, New York County.

This schedule also contains a statement of any real property left by the decedent which it is not necessary
1931 to include as estate assets to be accounted for, a brief description thereof, the gross value, the amount of mortgages or liens thereon at the date of death of deceased, so far as known to this executor.

1932

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1933

THE FOLLOWING IS A SUMMARY STATEMENT OF THIS EXECUTOR'S ACCOUNT:

CHARGES:

Amount shown by Schedule "A" (Original capital of estate as shown by prior account as of March 18th, 1927)	$1,976.87		
and reimbursements	58,770.65	$ 60,747.52	1934
Amount shown by Schedule "A-1" (increment to capital since March 18th, 1927)		1,321,885.58	
Amount shown by Schedule "A-2" (Income during accounting period)		22,056.66	
Total Charges			$1,404,689.76

CREDITS:

Amount shown by Schedule "B" (Realized decreases and losses of capital asset values since March 18th, 1927)		$ 0	1935
Amount shown by Schedule "B-1" (Uncollectible property)		$ 392,382.43	
Amount shown by Schedule "C" (Funeral and administration expenses actually paid)		$ 229,867.35	
Amount shown by Schedule "E" (Debts actually paid)		$ 0	
Amount shown by Schedule "F" (Legacies or distributive shares actually paid)		$ 782,004.39	
Total Credits			$1,404,254.17
Balance on hand shown by Schedule "G"			$435.59

1936 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

The foregoing balance aggregating $435.59 consists of $435.59 in cash remaining on hand as of the 1st day of December, 1937. It is subject to deduction of estimated commissions amounting to $19,026.92, shown in Schedule J and of the expenses of this accounting and of the unpaid liabilities of the estate and of the executor chargeable to the estate shown in Schedules C-1, D and D-3.

In addition to the assets above mentioned, this Executor holds the refunding bonds of Mrs. Clara Sielcken-Schwarz
1937 shown in Schedule A-3, and the unpaid and at present uncollectible balance of the award of the mixed Claims Commission—United States and Germany, shown in Schedule B-1.

The attached schedules, which are severally signed by this Executor are part of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann
Sielcken, Deceased,
1938 By JOHN F. MCILWAIN,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

Schedule A.

ITEMIZED STATEMENT OF ALL MONEYS AND OTHER PROPERTY BELONGING TO THE ESTATE OF HERMANN SIELCKEN, DECEASED, WHICH HAVE COME INTO THE HANDS OF THE EXECUTOR, OR WHICH HAVE BEEN RECEIVED BY ANY PERSON FOR IT OR ON ITS BEHALF AS SUCH EXECUTOR SINCE THE OPENING OF BUSINESS ON MARCH 18TH, 1927, INCLUDING PROPERTY THEN ON HAND.

1927		
Mar. 18	Cash balance on hand, as shown by voluntary accounting as of March 18th, 1927 ..... (This voluntary accounting was confirmed and approved by final judgment of the Supreme Court for the County of New York rendered in an action in that Court entitled The Chase National Bank of the City of New York as Ancillary Executor of the last will and testament of Thorleif S. B. Nielsen, deceased, Plaintiff, against John S. Sorenson, Irving Trust Company as Executor of the last will and testament of Hermann Sielcken, deceased, Clara Sielcken Schwarz, and others, defendants, entered in the office of the Clerk of the County of New York on the 8th day of November, 1937.)	$ 1,976.87
Aug. 30	Refund from deposit with Clerk of United States Supreme Court	32.80
1931		
Apr. 28	Refund from Clara Sielcken Schwarz out of deposit with Chase National Bank	39,999.20
1933		
Dec. 6	Refund from deposit with Clerk of United States District Court, Southern District of New York in Stewart suit	8.00
1934		
Apr. 23	Subpoena fee in Matter of Sielcken	1.00
1935		
Apr. 23	Subpoena fee in Matter of Sielcken	2.00

1942 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

May 17 1936	Subpoena fee in Toledo action		1.00
Jan. 22 1937	Subpoena fee in Matter of Sielcken		.50
Mar. 29	Voluntary Return by Executor of part of award of Executor's Commissions by decree of February 9, 1925, inadvertently in excess of correct computation thereof		759.15
Oct. 26	Refund from deposit with Chase National Bank pursuant to decree of Surrogate of October 23rd, 1937		17,967.00
			$60,747.52

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

Schedule A-1.

1944

STATEMENT OF ALL INCREMENT TO THE CAPITAL OF THE ESTATE.

The Executor charges itself with:

Receipts from Partnership Claims of Firm of Crossman & Sielcken, first discovered after March 18th, 1927.

Receipts from Zentral Einkaufs-Gesellschaft claim:		
Cash	$ 83,240.70*	
United States Treasury Notes 3½% ($130,000 of these notes were redeemed in Cash; and the other $100,000 were distributed to the residuary legatee, as shown in Schedule F.)	230,000.00*	
		313,240.70

Exhibit A Annexed to Answering Affidavit of Selden Bacon

1945

Receipts from Mixed Claims Commission Award on Wille claim:

1930			
June 2	Cash from United States Treasury	$466,369.69*	
Nov. 12	Cash from United States Treasury	43,299.08*	
1931			1946
Apr. 28	Cash from United States Treasury	28,577.39*	
1932			
Jan. 8	Cash from United States Treasury	78,016.29*	
	Total		$ 616,262.45
	Unpaid balance of such Award now uncollected and at present uncollectible (See Schedule G) consisting of		1947
	Balance Principal of Award	$211,922.88*	
	Interest accrued on Award to October 9th, 1931, as reported by United States Treasury	122,367.39*	
			334,360.27*
	Subsequent interest computed to March 31, 1937, as reported by Treasury Department		58,022.16
	Total		$1,321,885.58

NOTE:—The history of the above items will be found in Schedules I and K.

1948 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

All starred items shown in this Schedule were also included in the partnership accounting in the Supreme Court and were settled and approved by the judgment in that case of November 8th, 1937. They are starred here for reference made thereto in Schedule K of this account.

December 1, 1937.

1949 IRVING TRUST COMPANY,
as Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

Schedule A-2.

STATEMENT OF INCOME RECEIVED SINCE MARCH 18TH, 1927.

1930			
May	28	Bank interest November 29 to May 21, 1930 (Three Name Account)	$ 109.73*
1950 Sept.	15	Coupons $230,000 United States Treasury Notes (Three Name Account)	4,025.00*
Nov.	15	Bank interest May 21 to November 14, 1930 (Three Name Account)	3,527.10*
Nov.	28	Bank interest November 12 to November 21, 1930 (Three Name Account)	33.22*
Nov.	28	Bank interest to November 21, 1930	110.36
1931			
Jan.	15	Bank interest November 22 to January 1, 1931 (Three Name Account)	128.12*
Jan.	15	Bank interest to January 14, 1931	887.34
Mar.	16	Coupons on $130,000 U. S. Treasury 3½% Notes	2,275.00
May	28	Bank interest to May 21, 1931	1,043.52
Nov.	25	Bank interest to November 21, 1931	1,521.04
Nov.	27	Bank interest to November 21, 1931 (Three Name Account)	1,070.36*

Exhibit A Annexed to Answering Affidavit of Selden Bacon

1932			
May 24	Bank interest to May 21, 1932	1,292.71	
May 25	Bank interest to May 21, 1932 (Three Name Account	1,060.55*	
Nov. 28	Bank interest to November 22, 1932	960.77	
Nov. 29	Bank interest to November 22, 1932 (Three Name Account)	1,203.00*	
1933			
Sept. 13	Bank interest to June 15, 1933 (Three Name Account)	1,363.59*	
Nov. 14	Bank interest to June 15, 1933	906.61	
1934			
May 19	Bank interest to May 19, 1934, on $10,000 deposit, in Rosenblum case	458.37	
1935			
Dec. 7	Bank interest to November 21, 1935	35.85	
1936			
Dec. 5	Bank interest to November 21, 1936	33.22	
1937			
Oct. 5	Bank interest to November 30, 1937	11.20	
		$22,056.66	

(Certain portions of the payments received set forth in Schedule A-1 included some interest in the gross amounts awarded by the United States District Court decree and by the Mixed Claims Commission Award. But, as both principal and income go into a common fund, and there is no separate beneficiary of income, we have not attempted the complicated separation of these items into their component parts, but have included the entire items so received as principal in Schedule A-1 of this Account.)

Starred receipts in this Schedule were re-received into the Three Name Account, were

1954 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

included in the Partnership Accounting in the Supreme Court and settled and approved by its judgment of November 8, 1937, and are referred to in Schedule K of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

1955

1956

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1957

Schedule A-3.

REFUNDING BONDS.

In addition to these funds belonging to the Estate the Executor, on the occasions of different distributions to the residuary legatee, Clara Sielcken Schwarz, received from her refunding bonds of the following dates and in the following amounts:

Bond of April 6th, 1921 in the penal sum of 1958
$3,000,000 securing return of $1,500,000, or such part thereof as shall appear to be necessary for the payment of legacies, debts or liabilities.

Bond of February 9th, 1925 in the penal sum of $559,836.88 to secure repayment of $279,918.44 or such part thereof as shall appear to be necessary for the payment of legacies, debts or liabilities.

Bond of date February 24th, 1931 in the penal sum of $600,000 of which copy is hereto annexed, marked Exhibit A and hereby made a part of this Schedule.

Bond of date February 24th, 1931 in the penal sum of $79,998.40 of which copy is hereto annexed marked Exhibit B and hereby made a part of this Schedule. 1959

In connection with the last two bonds, said Clara Sielcken Schwarz made a deposit with The Chase National Bank of the City of New York as security for the said bonds of various securities. Also annexed hereto is a copy of the agreement under which the said securities were deposited with the said Chase National Bank which is marked Exhibit C. Said exhibits A, B and C are hereby made parts of this account.

The two payments of $39,999.20 of April 28, 1931 and of $17,967 of October 26, 1937, shown in Schedule A were refunds to the executor out of such deposit.

As this executor is informed and believes, the securities and cash now held by the said Chase National Bank

1960 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

as such depositary as security for the said last two-mentioned refunding bonds consist of the following items:

Cash Balance	$55,961.61
$5,000 Baltimore & Ohio R. R. Co. F RF & GN 5%, due March 1996.	
$10,000 Bush Term Bldg. Co. 1st Mg. 5%, due April 1960.	
$5,000 Canadian National Railways 5%, due July, 1969.	
1961 $5,000 City Wat Co. Chatta B 1st Mg. 5%, due December, 1954.	
$15,000 Interstate Public Service Co Dist & Rf 5%, due December 1956.	
$20,000 Interstate Pr Co Del 1st Mg. 5%, due January, 1957.	
$20,000 Joplin Water Works Co. A 1st Mg. 5%, due March, 1957.	
$25,000 Louisiana Pr. & Lt. Co. 1st Mg. 5%, due December, 1957.	
$25,000 Mississippi Pr. & Lt. Co. 1st Mg. 5%, due December, 1957.	
$15,000 Nevada California El. Corp. 1st Mg.	
1962 5%, April, 1956.	
$15,000 New Orleans Public Service B 1st & Rf. 5%, due June, 1955.	
$30,000 New York Dock Co. 1st Mg. 4%, due August, 1951.	
$25,000 Penn Central Lt. & Pr. Co. 1st Mg. 4½%, due November, 1977.	
$20,000 St. Louis Iron Mt. So. Ry. 1st Mg. 4%, due May, 1933.	
$20,000 Cd. St. Louis San Fran A PRILN 4%, due July, 1950.	
$10,000 South Pitts. Water Co. A 1st & Rf, 5%, due January, 1960.	
$19,000 Southern Pacific Co. 4½%, due May, 1969.	
$20,000 Wabash R. R. Co. 2d Mg. 5%, due February, 1939.	
$5,000 Wichita Water Co. Ser. B 1st Mg. 5%,	

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1963

Since the deposit of said amounts, the said Clara Sielcken Schwarz has made, as the executor is informed and believes, assignments of interest in any balance of said deposit not needed to meet the obligations to the estate, to various persons as security as follows:

To the New York Trust Company as Trustee, subsequently transferred to Emilie Bender and Brainard Avery as substituted Trustees, to secure various sums now aggregating approximately $20,000 1964

To Brainard Avery	New York City
To Howard Hasbrouck	New York City
To George W. Alger	New York City
To I. Gainsburg	New York City
To Isaac H. Levy	New York City
To Newton D. Baker	Cleveland, Ohio
To Raymond T. Jackson	Cleveland, Ohio
To Harold Fraser	Toledo, Ohio
To Charles H. Kelby	Borough of Manhattan, N. Y.
To John G. Saxe	Borough of Manhattan, N. Y.
To Joseph M. Proskauer	Borough of Manhattan, N. Y. 1965
To Leonard P. Moore	Borough of Manhattan, N. Y.
To James D. Miller	Borough of Manhattan, N. Y.
To William Martin	Borough of Manhattan, N. Y.
To Charles D. Hamel	Washington, D. C.

to secure the sum of $200,000 for their services to her.

The interest of said Martin under such assignment was thereafter by him assigned to the Bank of Valley Stream which has been taken over by the Banking Superintendent of the State of New York.

Certain other assignments of her interest in such fund had also as this executor is informed and believes, been made by said Clara Sielcken Schwarz to various per-

1966 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

sons as security, subject to the rights of this executor but such other assignments, as this executor is informed and believes, have all been satisfied and released, and the above-named persons are the only claimants besides this executor and said Clara Sielcken Schwarz of interests in the said fund, save only that The Chase National Bank of the City of New York, as your petitioner is informed and believes, also makes a claim thereon for commissions for acting as depositary of said fund.

1967

Exhibit A.

KNOW ALL MEN BY THESE PRESENTS, That I, CLARA SIELCKEN SCHWARZ, am held and firmly bound unto IRVING TRUST COMPANY, a corporation organized under the laws of the State of New York, as Executor of the Will of Hermann Sielcken, deceased, in the sum of Six Hundred Thousand Dollars ($600,000.00), good and lawful money of the United States, to be paid to the said Executor as aforesaid, its successors or assigns, for which
1968 payment well and truly to be made, I do bind myself, my heirs, executors and administrators firmly by these presents.

Sealed with my seal.

Dated this 24th day of February, 1931.

WHEREAS, the said Hermann Sielcken, husband of the said Clara Sielcken Schwarz, by his last will bearing date the 23rd day of March, 1914, gave and bequeathed to the said Clara Sielcken Schwarz his entire residuary estate; and

WHEREAS, the said executor has this day paid to the said Clara Sielcken Schwarz on account of the said legacy the sum of Three Hundred Thousand Dollars ($300,000), receipt whereof is hereby acknowledged by said Clara Sielcken Schwarz;

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1969

Now the condition of this obligation is such that if the money so paid as aforesaid to the said Clara Sielcken Schwarz on account of her said legacy, shall at any time be necessary to discharge any debt, liability or legacy which the said Executor shall not have other assets to pay, then and in such case, or in any of such cases, if the said Clara Sielcken Schwarz, her heirs, executors or administrators shall return the said payment of Three Hundred Thousand Dollars ($300,000), and also any payments which may be hereafter made by the said Executor to said Clara Sielcken Schwarz on account of her said 1970
legacy, or such part thereof as shall appear to be necessary for the payment of such debts, liabilities or legacies, and the costs and charges, if there be any, incurred by reason of the payment of said Clara Sielcken Schwarz; or if the probate of the will of the said deceased be revoked or the will declared void, wholly or as to such legacy, then and in such case if the said Clara Sielcken Schwarz shall return the whole of the said payment of Three Hundred Thousand Dollars ($300,000) with interest, to the said Irving Trust Company as such Executor, its successors or assigns, then this obligation is to be void; otherwise to remain in full force and virtue. 1971

CLARA SIELCKEN SCHWARZ (Seal)

In the presence of:
ELIZABETH BAY

Consulate of the U. S. A.
Republic of France
Department of the Maritime—Alps ss:
City of Nice

I, Geo. P. Wilson, Vice Consul of the United States of America, at Nice, France, duly commissioned and qualified, do certify that on this 24th day of February, 1931, before me personally appeared CLARA SIELCKEN SCHWARZ, to me known and known to me to be the individual described in, whose name is subscribed to, and who executed the foregoing instrument and being by me in-

1972 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

formed of the contents of said instrument, she duly acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year above written.

GEO. P. WILSON, Vice Consul,
Vice Consul of the United States of America, Nice, France.

1973 American Consulate
Nice, France
$2.00 Fee Stamp
Cancelled Feb. 24, 1936

Service No. 00604
Fee 51.20

Exhibit, B.

KNOW ALL MEN BY THESE PRESENTS, That I, CLARA SIELCKEN SCHWARZ, am held and firmly bound unto IRVING TRUST COMPANY, a corporation organized under the
1974 laws of the State of New York, as Executor of the Will of Hermann Sielcken, deceased, in the sum of Seventy-nine thousand nine hundred and ninety-eight and 40/100 Dollars ($79,998.40), good and lawful money of the United States, to be paid to the said Executor as aforesaid, its successors or assigns, for which payment well and truly to be made, I do bind myself, my heirs, executors and administrators firmly by these presents.

Sealed with my seal.

Dated, this 24th day of February, 1931.

WHEREAS, the said Hermann Sielcken, husband of the said Clara Sielcken Schwarz, by his last will bearing date the 23rd day of March, 1914, gave and bequeathed to the said Clara Sielcken Schwarz his entire residuary estate; and

WHEREAS, the said executor has this day paid to the said Clara Sielcken Schwarz on account of the said legacy

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1975

the sum of Thirty-nine thousand nine hundred and ninety-nine and 20/100 dollars ($39,999.20), receipt whereof is hereby acknowledged by said Clara Sielcken Schwarz;

Now the condition of this obligation is such that if the money so paid as aforesaid to the said Clara Sielcken Schwarz on account of her said legacy, shall at any time be necessary to discharge any debt, liability or legacy which the said Executor shall not have other assets to pay, then and in such case, or in any of such cases, if 1976
the said Clara Sielcken Schwarz, her heirs, executors or administrators shall return the said payment of Thirty-nine thousand nine hundred and ninety-nine and 20/100 dollars ($39,999.20), and also any payments which may be hereafter made by the said Executor to said Clara Sielcken Schwarz on account of her said legacy, or such part thereof as shall appear to be necessary for the payment of such debts, liabilities or legacies, and the costs and charges, if there be any, incurred by reason of the payment of said Clara Sielcken Schwarz; or if the probate of the will of the said deceased be revoked, or the will declared void, wholly or as to such legacy, then and 1977
in such case if the said Clara Sielcken Schwarz shall return the whole of the said payment of Thirty-nine thousand nine hundred and ninety-nine and 20/100 dollars ($39,999.20) with interest, to the said Irving Trust Company as such Executor, its successors or assigns, then this obligation is to be void; otherwise to remain in full force and virtue.

CLARA SIELCKEN SCHWARZ (Seal)

In the Presence of:
ELIZABETH BAY

Consulate of the U. S. A.
Republic of France
Department of the Maritime—Alps ss.:
City of Nice

I, Geo. P. Wilson, Vice Consul of the United States of America, at Nice, France, duly commissioned and quali-

1978 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

fied, do certify that on this 24th day of February, 1931, before me personally appeared CLARA SIELCKEN SCHWARZ, to me known and known to me to be the individual described in, whose name is subscribed to, and who executed the foregoing instrument and being by me informed of the contents of said instrument, she duly acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand
1979 and official seal the day and year above written.

GEO. P. WILSON, Vice Consul
Vice Consul of the United States of America, Nice, France.

AMERICAN CONSULATE,
NICE, FRANCE
$2.00 Fee Stamp
Cancelled Feb. 24, 1931

Service No. 00603
Fee 51.20

1980 *Exhibit C.*

IRVING TRUST COMPANY

AMERICAN EXCHANGE OFFICE

Sixty Broadway

New York

ORRIN R. JUDD
Vice President

February 3rd, 1931.

Chase National Bank of the City of New York,
20 Pine Street,
New York City:

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1981

Gentlemen:

This Company is Executor of the Will of Hermann Sielcken, deceased, and as such Executor we hold certain funds against which a number of claims have been asserted by various persons and are now in course of litigation. Mrs. Clara Sielcken Schwarz, the residuary legatee under the said Will, has requested us to make her payments aggregating the sum of $339,999.20 without waiting for the outcome of the pending litigation, and is proposing to give her refunding bonds in the usual form 1982
binding her to return the said payments, or such part thereof as shall appear to be necessary, in case the Executor shall at any time be called upon to discharge any debt, liability or legacy which it shall not have other assets to pay, or in case the probate of the Will of said decedent shall be revoked or the Will declared void, wholly or as to such residuary legacy. She has also offered to us that she will authorize you to set aside securities belonging to her and now in your custody as her agent, of the aggregate market value of $400,000, to hold as a special deposit as collateral security for the said proposed refunding bonds, to indemnify us against any loss, liability or damage that we may incur by having 1983
made the said proposed payments to Mrs. Sielcken-Schwarz.

We hereby hand you checks to your order aggregating the sum of $339,999.20 upon the condition that you are either to furnish to us, before April 1, 1931, receipts for said sum and refunding bonds in the form herewith handed you duly executed by Mrs. Sielcken Schwarz, and are also to give us within that time a letter signed by yourselves and stating that by authority of Mrs. Sielcken Schwarz you hold as a special deposit as collateral security as aforesaid, securities belonging to Mrs. Schwarz aggregating in market value the sum of $400,000; or else, in the event of your failure to deliver to us the said refunding bonds and the said letter of deposit before April 1, 1931, you are to return to us the said payment of $339,999.20 herewith made to you, with banking interest.

1984 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

The conditions of the said proposed special deposit are to be as follows. The securities making up said deposit are to be selected to our satisfaction from the securities belonging to Mrs. Sielcken Schwarz in your possession, and we are to have the right at any time during the term of the deposit to require changes or substitutions in the said securities, provided only that all new securities thus required by us shall be first-class negotiable securities legal for trust funds. Until service upon
1985 you by us of written notice that we claim the right to immediate reimbursement out of said deposit, you shall be at liberty to pay the income from the securities as it accrues to Mrs. Sielcken Schwarz. The said deposit shall be held by you until receipt of a written release from us, and such release shall not be demanded of us until the termination of all litigation affecting the funds now in our hands as aforesaid.

Kindly sign the acceptance at the foot of this letter as evidence of your agreement to the terms of the payment herewith made to you.

Very truly yours,

1986 IRVING TRUST COMPANY,
as Executor of the Will of Hermann Sielcken, deceased.

By O. R. JUDD,
Vice-President

Accepted:
CHASE NATIONAL BANK OF THE CITY OF NEW YORK
By G. E. Warren,
Vice-President.
December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,

By JOHN F. MCILWAIN,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1987

B.

DECREASES IN ESTATE SINCE MARCH 18TH, 1927.

(NONE.)

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken,
Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary. 1988

Schedule B-1.

UNCOLLECTED DEBTS DUE DECEDENT ENURING TO BENEFIT OF ESTATE.

I.

1989

1931

Oct. 9 Uncollected balance of Award of Mixed Claims Commission—United States and Germany.

Balance as of this date, as shown by United States Treasury report of that date.

Principal (*so-called*) made up of *principal* at date of April 1, 1918 (including interest to that date from decedent's death on October 8th, 1917) $558,827.85

Exhibit A Annexed to Answering Affidavit of Selden Bacon

and interest at 5 per cent from April 1st, 1918 to April 21st, 1930 (date of award)	$272,524.27	
Total Principal Award		$831,352.12
Against which payments have been made by United States Treasury aggregating, as shown in Schedule A-1		$619,359.24
(From each of the above payments there was deducted by the United States Treasury before payment ½ of 1 per cent of each payment pursuant to the United States Statute so that the amount actually received by the Estate from the Treasury was only, as shown in Schedule A-1 $616,262.45)		
Balance due of such principal		$211,992.88
Unpaid Interest accruing on the balance of such "principal" subsequent to date of the Award to October 9th, 1931		$122,367.39
Additional interest from Oct. 9th, 1931 to March 31st, 1937		$ 58,022.16
		$392,382.43

(This Balance is Subject to U. S. Treasurer's Commissions.)

Exhibit A Annexed to Answering Affidavit of Selden Bacon

1993

Under the arrangement made by Mrs. Clara Sielcken Schwarz with the attorneys whom she employed to present that claim before the Mixed Claims Commission, (at her own expense), as this executor is informed and believes, there will be due to her said attorneys from her 20 per cent or more of any further sums received from the Treasury Department on this award. Those attorneys, as this executor is informed and believes, claim to have a lien for such 20 per cent or more on any further sums collected under this Award.

1994

The reason why the balance of this claim under the Award has not been collected is that:

Under the Act of Congress (Act Mar. 10, 1928, C. 167) and the Treaty provisions by which such Mixed Claims Commission was created (agreement between the United States and Germany of date August 10, 1922), the various awards made by the Commission are payable out of the United States Treasury only out of funds received by it from or on account of the German Reich available for the purpose. Since October 9th, 1931 there have been no funds in the United States Treasury deemed by it available for such distribution.

1995

In answer to an inquiry on behalf of this Executor, we have received the following information from the Treasury Department of the United States, which we believe true and correct.

1996 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"TREASURY DEPARTMENT
Office of the Secretary
Washington

Commissioner of
Accounts and Deposits

November 22, 1937.

Duer, Strong and Whitehead,
15 Broad Street,
New York, New York.

1997 Gentlemen:

Receipt is acknowledged of your letter of November 16, 1937, requesting information with respect to further payments out of the German Special Deposit Account, on account of the award made to Crossman and Sielcken by the Mixed Claims Commission, United States and Germany under Docket No. 8304.

(a) The amount on deposit in the German Special Deposit Account or available thereto is approximately $19,800,000, which the Secretary of the Treasury will have to disburse in accordance with the priorities established in Section 4 of the Settlement of War
1998 Claims Act of 1928.

(b) The Secretary of the Treasury has received no official notice from the Secretary of State of the final disposition of applications of the Black Tom claimants. The Treasury is not in a position to state when these claims will be disposed of.

(c) If the so-called sabotage claims are disallowed and the funds available to the German Special Deposit Account are distributed, the American claimants holding Class 3 awards (awards in excess of $100,000) would be entitled to an additional payment under priority No. 5 of approximately 5% on balance due on principal account (award plus interest to January 1, 1928) and a payment under priority No. 8 of approximately 22% on the interest accrued from January 1, 1928 to March 31, 1937. On this award

Exhibit A Annexed to Answering Affidavit of Selden Bacon

the dollar amounts would be approximately as follows:

5%	of balance of unpaid principal of $211,992.88	$10,599.64
22%	of interest accrued from January 1, 1928 to March 31, 1937, aggregating $180,389.55	$39,685.70

If, however, the sabotage claims are allowed, there would be no funds available for distribution after these claimants were paid the same percentage as other Class 3 claimants.

(d) After the distribution of the reserve fund referred to above, no further funds will be available to the German Special Deposit Account until the Government of Germany resumes payments on the reichsmarks bonds deposited with the Treasury under the debt funding agreement of June 23, 1930. No payments have been received on these bonds since September 30, 1931.

Very truly yours,

M. COLLINS.

M. COLLINS,
Assistant Commissioner of
Accounts and Deposits."

The Executor is unable to realize the value of the balance of said Award by a sale thereof because under the provisions of the Acts of Congress no such claims against the United States can be sold or transferred.

The Executor is thus powerless either to collect or to sell this asset of the unpaid balance of this Award and believes the value thereof problematical.

II.

While not in strictness, as this executor is advised and believes, a part of the estate, the Executor also holds

Exhibit A Annexed to Answering Affidavit of Selden Bacon

the various refunding bonds from the residuary legatee set forth in Schedule A-3 hereof.

These have not been collected on beyond the two items of $39,999.20 and $17,967.00 shown in Schedule A for several reasons including the facts that the residuary legatee has for many months past been absent in Germany, and, as far as this Executor has been able to learn, has no available assets in the United States (except the fund on deposit with the Chase National Bank of the City of
2003 New York to secure the last two of the said refunding bonds, which is set forth in Schedule A-3 hereof). She also has asserted to this executor (through her attorneys) that despite the sums distributed to her by this executor out of this estate, as shown in this and the prior accountings, aggregating over $4,000,000, she now has no property left except certain real estate in Germany, which she claims to be unable to sell, or, if sold, to bring the proceeds out of Germany, plus her remaining interest in the said deposit with the Chase National Bank. And she and various of her assignees of interests in said fund (subject to the prior rights of this executor) have indicated opposition to the application of the said fund to
2004 meet the obligations of the estate, except only as consents were given to the two payments out of that fund of $39,999.20 and $17,967.00 shown in Schedule A; and the said Chase National Bank, for its own protection declines to make payments out of such fund otherwise than by unanimous consent of all parties in interest therein, or pursuant to decree of court binding on all such parties.

Adjustment of this account of this executor is moreover, necessary as a basis for any such decree, and for that reason this Executor desires that the said Chase National Bank and all other persons claiming any interest in the said fund on deposit with it be cited to attend this accounting.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken,
Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2005

SCHEDULE C.

DISBURSEMENTS FOR ADMINISTRATION AND OTHER NECESSARY EXPENSES OF SAID ESTATE

1927				
Sept. 15	John L. McMaster, one half of refund from Clerk of United States Supreme Court		$ 16.40	
Oct. 6	Commerce Photo-Print Corporation for photostats		2.40	2006
1930				
Sept. 27	Commerce Photo-Print Corporation for photostats		5.40	
Oct. 18	Cablegram to Brainard Avery		6.90	
Nov. 8	Commerce Photo-Print Corporation for photostats		2.80	
Dec. 12	Commerce Photo-Print Corporation for photostats		1.00	
1931				
Feb. 5	Hamel & Doyle for legal services in re income tax questions	$2,000.00		2007
	and disbursements	56.40		
			2,056.40	
Feb. 5	Commerce Photo-Print Corporation for photostats		3.20	
Mar. 14	Avery & Whiting, at request of residuary legatee, for legal services rendered executor		4,350.00	
July 13	Fidelity & Deposit Company of Maryland premium on bond in Rosenblum suit.....		100.00	
Aug. 21	Leonard B. Smith for disbursements.....		63.70	
Oct. 8	Leonard B. Smith for services as attorney from March 18th, 1927 to October 9, 1931		2,500.00	
Oct. 13	Commerce Photo-Print Corporation for photostats		2.40	
Oct. 14	Commerce Photo-Print Corporation for photostats		1.20	

2008 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

	Oct. 15	Telephone call to Cleveland, Ohio	2.25
	Oct. 31	Commerce Photo-Print Corporation for photostats	3.00
	Nov. 9	Carfare to Newark and return	.40
	Nov. 20	Commerce Photo-Print Corporation for photostats	.40
	Nov. 23	Commerce Photo-Print Corporation for photostats	.70
	Dec. 5	Commerce Photo-Print Corporation for	
2009		photostats	.75
	Dec. 11	Commerce Photo-Print Corporation for photostats	.80
	Dec. 18	John Kratz for services $25 and disbursements $15.49, in locating papers in office of Alien Property Custodian and securing copies	40.49
	Dec. 23	Duer, Strong & Whitehead for legal services on account	2,500.00
	1932		
	Jan. 6	Commerce Photo-Print Corporation photostats re Chase Bank suit	3.50
2010	Jan. 7	Commerce Photo-Print Corporation photostats re Chase Bank suit	1.75
	Jan. 8	Commerce Photo-Print Corporation photostats re Chase Bank suit	2.00
	Jan. 14	Commerce Photo-Print Corporation photostats re Chase Bank suit	3.75
	Jan. 18	Commerce Photo-Print Corporation photostats re Chase Bank suit	1.20
	Jan. 21	Commerce Photo-Print Corporation photostats re Chase Bank suit	.15
	Jan. 25	Commerce Photo-Print Corporation photostats re Chase Bank suit	9.20
	Jan. 29	Commerce Photo-Print Corporation photostats re Chase Bank suit	1.20
	Jan. 30	Commerce Photo-Print Corporation photostats re Chase Bank suit	.80
	Feb. 1	Benjamin N. Goodglass, stenographer's minutes in Chase Bank suit	988.40

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2011

Feb.	4	Commerce Photo-Print Corporation photostats re Chase Bank suit		22.25
Feb.	10	Commerce Photo-Print Corporation photostats re Chase Bank suit		3.00
Feb.	13	Commerce Photo-Print Corporation photostats re Chase Bank suit		2.80
Feb.	19	Franklin Fireproof Warehouse, Inc. for cartage		50.00
Feb.	27	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit		812.20
Mar.	8	New York Herald Tribune for classified advertisement re Chase Bank suit		3.25
Mar.	9	New York Times for public notice re Chase Bank suit		5.00
Mar.	11	New York Times for classified advertisement re Chase Bank suit		6.00
Mar.	11	Duer, Strong & Whitehead on account of legal services		5,000.00
Mar	14	Avery & Whiting for disbursements		
		re Elfenbein	$371.59	
		re Four Managers' suits	67.45	
				439.04
Mar.	14	Weinberg & Josephson, accountants, services. re income taxes		1,000.00
Mar.	19	Hugh McGuckin for services as accountant re Chase Bank suit		500.00
Mar.	22	Kolesch & Company for photostats re Chase Bank suit		4.80
Mar.	24	Weed & Kennedy, Inc., premium on injunction bond re Rosenblum		100.00
Mar.	24	Commerce Photo-Print Corporation photostats re Chase Bank suit and Rosenblum suit		.40
Mar.	25	Arthur T. Vanderbilt		
		legal services	$1,000.00	
		disbursements	46.40	
		re New Jersey suit		
		Alex W. Sielcken vs. Sorenson et al.		
				1,046.40

2012

2013

Exhibit A Annexed to Answering Affidavit of Selden Bacon

	Mar. 26	Commerce Photo-Print Corporation photostats re Chase Bank suit	.80
	Apr. 6	Nicholas W. Bindseil, Transcript of stenographer's minutes in New Jersey suit Alex W. Sielcken vs. Sorenson *et al.*	45.20
	Apr. 6	Benjamin N. Goodglass, stenographer's minutes in Chase Bank suit	1,134.20
	Apr. 14	Commerce Photo-Print Corporation photostats re Chase Bank suit	6.25
2015	Apr. 16	Hugh McGuckin, services as accountant in Chase Bank suit	500.00
	Apr. 26	Commerce Photo-Print Corporation Photostats	5.00
	Apr. 27	Arthur Terry for services in hearings before Referee Henry F. Wolff in Chase Bank and Rosenblum suits	36.00
	May 2	Commerce Photo-Print Corporation, photostats	7.20
	May 4	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit	529.20
	May 4	Duer, Strong & Whitehead, disbursements re Chase Bank suit	5.12
2016	May 20	Hugh McGuckin for Accountant's services in re preparation of answer to petition to open decrees	75.00
	May 21	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit	935.50
	June 1	Commerce Photo-Print Corporation, photostats re Rosenblum suit	16.50
	June 14	Benjamin N. Goodglass for stenographer's minutes in Rosenblum case	213.00
	June 14	Telephone call to Toledo, Ohio	8.15
	June 14	Avery & Whiting for services and disbursements, Rosenblum case	539.64
	June 15	Duer, Strong & Whitehead on account of legal services	17,500.00
		for disbursements	90.88
	June 25	Commerce Photo-Print Corporation photostats re Rosenblum suit	.20

Exhibit A Annexed to Answering Affidavit of Selden Bacon.

June	25	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit		355.80
July	8	Stone & Webster Building, Inc., rent of space at 90 Broad Street for records		200.00
July	8	Leonard B. Smith, Esq., for disbursements		129.22
Sept.	1	Commerce Photo-Print Corporation for photostats re Chase Bank suit		24.88
Oct.	3	Franklin Fireproof Warehouse, Inc. storage bill		60.00
Nov.	1	Commerce Photo-Print Corporation photostats re Chase Bank suit		.20
Nov.	17	Avery & Whiting for services in Rosenblum Case		1,000.00
Dec.	8	Commerce Photo-Print Corporation photostats re Chase Bank suit		.80
1933				
Feb.	24	Avery & Whiting in Rosenblum suit for services	$1,350.00	
		disbursements	58.01	1,408.01
Mar.	28	Benjamin N. Goodglass for stenographer's minutes in Chase Bank and Rosenblum suits		144.20
Apr.	7	Commerce Photo-Print Corporation photostats re Chase Bank suit		1.98
Apr.	10	Commerce Photo-Print Corporation for photostats re Chase Bank suit		5.50
Apr.	11	Williams, Eversman & Morgan, Toledo, Ohio, attorneys in Woolson Spice Company suit		
		Retainer	$ 500.00	
		Disbursements	18.59	518.59
Apr.	11	Leonard B. Smith		
		for disbursements	$ 24.05	
		for legal services October 9, 1931 to April 10, 1933	1,500.00	1,524.05

2017

2018

2019

Exhibit A Annexed to Answering Affidavit of Selden Bacon

	Apr.	25	Henry F. Wolff, Esq., for services and disbursements as Referee in Rosenblum suit	2,885.25
	June	16	Henry F. Wolff, Referee's fees, Chase Bank case	9,695.31*
	June	17	Check tax	.02*
			(These last two items were included in the partnership accounting in the Supreme Court and there approved by the Supreme Court judgment of November 8, 1937).	
2021	June	30	Commerce Photo-Print Corporation, photostats re Rosenblum suit	6.60
	July	8	Commerce Photo-Print Corporation photostats re Rosenblum suit	2.82
	Sept.	14	Commerce Photo-Print Corporation photostats re Rosenblum suit	1.44
	Sept.	18	Duer, Strong & Whitehead on account of legal services $15,000.00 disbursements 153.68	
				15,153.68
2022	Oct.	11	Commerce Photo-print Corporation photostats re Rosenblum suit	.89
	Oct.	23	Pioneer Fire Proof Storage Warehouse Corporation storage	50.52
	Nov.	1	Commerce Photo-Print Corporation photostats re Rosenblum suit	1.09
	Nov.	21	Commerce Photo-Print Corporation photostats re Rosenblum suit	.73
	Dec.	18	Commerce Photo-Print Corporation photostats re matter of Sielcken	2.36
	1934			
	Jan.	12	Pioneer Fire Proof Storage Warehouse Corporation, storage	151.56
	Jan.	19	Henry F. Wolff, Esq., for services as Referee, and disbursements in Chase Bank suit	150.80
	Jan.	23	Henry F. Wolff, Esq., for services as Referee, and disbursements re Chase Bank suit	100.24

Exhibit A Annexed to Answering Affidavit of Selden Bacon

Feb.	2	John S. Sorensen for services examining accounts of Crossman & Sielcken	500.00	
Feb.	5	Ballou Press, Printing answer re Sielcken	675.69	
Feb.	8	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	
Feb.	20	Ballou Press, printing index to answer	42.42	
Mar.	2	Louis S. Williams Company for photostats re Sielcken	.50	
Mar.	5	Commerce Photo-Print Corporation, photostats re Sielcken	1.33	
Mar.	7	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	2024
Mar.	8	Garfield & Wrubel for John S. Sorenson for services examining accounts of Crossman & Sielcken	500.00	
Mar.	15	Commerce Photo-Print Corporation, photostats re Sielcken	.36	
Mar.	15	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit	12.60	
Apr.	2	Garfield & Wrubel for John S. Sorenson services examining accounts of Crossman & Sielcken	500.00	
Apr.	6	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	2025
Apr.	10	Duer, Strong & Whitehead on account of legal services $5,000.00 disbursements 361.82	5,361.82	
Apr.	28	Duer, Strong & Whitehead, on account of legal services	15,000.00	
May	1	Garfield & Wrubel for John S. Sorenson for services examining accounts of Crossman & Sielcken	500.00	
May	2	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	
May	4	Commerce Photo-Print Corporation photostats re Sielcken	.18	
May	10	Commerce Photo-Print Corporation photostats re Sielcken	2.67	

2026 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

May	28	G. F. Baur of Hamburg, Germany, services in investigating and securing papers in re transfer 360 shares of Woolson Spice Company stock to Theodor Wille and search re naturalization application of Hermann Sielcken	203.68
May	31	Garfield & Wrubel for John S. Sorenson for services examining accounts of Crossman & Sielcken	500.00
2027 May	31	Williams, Eversman & Morgan, Toledo, Ohio, disbursements in Woolson Spice Company suit	65.83
June	9	Pioneer Fire Proof Storage Warehouse Company, storage of books	50.52
June	9	Mayor & Braun of Basel, Switzerland, services in connection with search for re-naturalization proceeding of Hermann Sielcken in Baden	326.10
July	10	Garfield & Wrubel for John S. Sorenson for services examining accounts of Crossman & Sielcken	500.00
July	10	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
2028 July	12	Collector of Internal Revenue in settlement of 1930 Federal Income Tax	22,192.65
July	16	Commerce Photo-Print Corporation, photostats	19.55
July	20	Duer, Strong & Whitehead on account of legal services $4,500.00 disbursements 93.98	4,593.98
Aug.	10	Commerce Photo-Print Corporation for photostats	1.32
Sept.	5	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Sept.	6	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Sept.	7	Williams, Eversman & Morgan for disbursement for copy of Ohio depositions in Woolson Spice suit	520.65

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2029

Sept. 7	Duer, Strong & Whitehead, part of expenses of trip of Mr. Bacon to Germany in re proceeding to open decrees		525.00	
Sept. 17	Leonard B. Smith, for disbursements	$ 88.20		
	for services as attorney from April 10, 1933 to September 10, 1934	1,500.00	1,588.20	
Sept. 29	Duer, Strong & Whitehead, on account of legal services	$9,000.00		
	for disbursements	321.14	9,321.14	2030
Oct. 8	Pioneer Fire Proof Storage Warehouse Company, storage		50.52	
Oct. 8	Certified copy of letters and telephone call in Germany re proceeding to open decree		6.48	
Oct. 24	Commerce Photo-Print Corporation, for photostats		2.88	
Oct. 24	Lawyers & Merchants Translation Bureau for translation of German documents		10.98	
Oct. 24	Stone & Webster Building Inc. rent of room for storage of books in re Chase Bank and Rosenblum actions		696.28	2031
Nov. 2	Daniel Levy, accountant, on account, for examination books of Crossman & Sielcken		750.00	
Nov. 13	Pioneer Fire Proof Storage Warehouse Company, storage		50.52	
Nov. 20	Charles D. Hamel for Legal services and disbursements re income tax matters, and other matters, paid at request of Clara Sielcken Schwarz		10,345.53	
Nov. 20	Stone & Webster Building, Inc. rent of space for books		60.00	
Nov. 21	A. Veyrassat, of Montreux, Switzerland, for services re investigations in Baden, and disbursements		113.50	
Nov. 30	John S. Sorenson, services on accounts of Crossman & Sielcken		560.00	
Dec. 4	Pioneer Fire Proof Storage Warehouse Company, storage		50.52	

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Dec.	20	Joseph Braun, for services and disbursements in securing documents in Germany	191.77
1935			
Jan.	4	Daniel Levy, accountant, on account for examination books of Crossman & Sielcken	750.00
Jan.	7	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Feb.	7	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
2033 Feb.	16	Daniel Levy, accountant, on account, for examination books of Crossman & Sielcken	750.00
Feb.	20	Edna S. Lewis as executrix of Clarence M. Lewis, deceased, for his fees for services as referee to his death	7,500.00
Mar.	2	Check taxes	2.04
Mar.	4	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Mar.	28	Daniel Levy, accountant, on account, for examination of books of Crossman & Sielcken	1,250.00
Apr.	2	John S. Sorenson, services re accounts of Crossman & Sielcken	460.00
2034 Apr.	8	Joseph Braun, balance of claim for fees and expenses in Germany	210.28
Apr.	9	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Apr.	11	Dr. Foster Kennedy for professional services as witness, selected by referee	350.00
Apr.	12	Thomas F. Falvey for copy of stenographer's minutes	634.50
Apr.	18	Duer, Strong & Whitehead on account of legal services $7,500.00 disbursements 325.90	7,825.90
Apr.	22	Telephone call to Boston re evidence in proceeding to open decrees	1.50
Apr.	23	Copies of "American Bank Attorneys" for 1917, 1918, 1919 and 1920	20.00

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2035

May	24	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	
June	3	Commerce Photo-Print Corporation for photostats	2.04	
June	5	Daniel Levy, accountant, on account, for examination books of Crossman & Sielcken	1,000.00	
June	19	Dr. Arthur Burchard on account of professional services re German law	750.00	
June	20	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	2036
June	26	Thomas F. Falvey for original copy of stenographer's minutes	2,942.25	
July	3	Louis Cohan, copy of minutes in Woolson Spice Company suit	230.75	
July	30	Louis Cohan, copy of minutes in Woolson Spice Company suit	124.25	
Aug.	27	Daniel Levy, accountant, on account, for examination of books of Crossman & Sielcken	1,000.00	
Sept.	6	Dr. Otto Steinel of Karlsruhe, Baden, Germany, for services and expenses re inquires in Germany for testimony in proceeding to open decrees	201.15	2037
Sept.	21	Commerce Photo-Print Corporation for photostats	7.04	
Sept.	21	Pioneer Fire Proof Storage Warehouse Company, storage	151.56	
Oct.	10	Duer, Strong & Whitehead on account of legal services $20,000.00 disbursements 473.23	20,473.23	
Oct.	22	Thomas F. Falvey, copy of stenographer's minutes of hearings	418.75	
Oct.	25	Commerce Photo-Print Corporation for photostats	.82	
Nov.	29	Daniel Levy, accountant, on account for examination of books of Crossman & Sielcken	1,500.00	
Oct.	31	John S. Sorenson, services on accounts of Crossman & Sielcken	530.00	

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Nov.	6	Louis Cohan, copy of minutes in Woolson Spice Suit	261.75
Nov.	12	Commerce Photo-Print Corporation for photostats	2.02
Nov.	12	Pioneer Fire Proof Storage Warehouse Company, storage	101.04
Nov.	21	Harriet W. Burhan for services in checking files and records	20.00
Nov.	29	Thomas F. Falvey for court transcript of stenographer's minutes	1,353.75

2039

1936

Jan.	6	Pioneer Fire Proof Storage Warehouse Corporation, for storage	101.04
Jan.	28	Dr. John H. Jantzen, Bremen, Germany, for searching for and securing certified copies relating to citizenship of Paul Isenberg, father of residuary legatee	42.18
Jan.	29	Thomas F. Falvey for original transcript of stenographer's minutes	429.75
Jan.	29	Thomas F. Falvey for copy of stenographer's minutes for counsel	522.00

2040

Feb.	3	Telephone call to Washington re certified copies of income tax returns	1.90
Feb.	4	Certified photostatic copies of income tax returns	2.50
Mar.	11	G. F. Baur of Hamburg, Germany, for services in Hamburg, Germany, in checking evidence obtainable in re Sielcken	153.47
Mar.	11	Pioneer Fire Proof Storage Warehouse Corporation	101.04
Mar.	17	Thomas F. Falvey for original transcript of stenographer's minutes and copy of stenographer's minutes for counsel	414.00
Mar.	24	Daniel Levy, accountant, on account, for examination of books of Crossman & Sielcken	1,000.00
May	11	Pioneer Fire Proof Storage Warehouse Corporation, storage	101.04

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2041

June	5	Pioneer Fire Proof Storage Warehouse Corporation, storage	50.52
June	8	Ballou Press for printing executor's brief in proceeding to open decrees	806.82
June	9	Louis Cohan, transcript of depositions in Woolson Spice suit	138.75
June	26	Duer, Strong & Whitehead for disbursements	219.12
July	3	Dr. Arthur Burchard on account of professional legal services re proceeding to open decrees	750.00
			2042
July	28	Pioneer Fire Proof Storage Warehouse Corporation, storage	50.52
July	29	Commerce Photo-Print Corporation for photostats	.56
July	31	Commerce Photo-Print Corporation for photostats	.41
Aug	8	Thomas F. Falvey for original transcript and copy for referee and one copy for counsel	380.00
Aug.	31	Commerce Photo-Print Corporation for photostats	1.23
			2043
Sept.	25	Thomas F. Falvey for original transcript and copy for referee and one copy for counsel	20.00
Sept.	25	Pioneer Fire Proof Storage Warehouse Corporation, storage	101.04
Oct.	19	Duer, Strong & Whitehead for disbursements	222.52
Oct.	20	Pioneer Fire Proof Storage Warehouse Company	50.52
Nov.	13	Pioneer Fire Proof Storage Warehouse Company	50.52
Nov.	23	Louis Cohan, copy of minutes in Woolson Spice suit	10.00
Dec.	5	Pioneer Fire Proof Storage Warehouse Company	50.52
Dec.	16	Ballou Press printing respondent's brief before Surrogate	428.15

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Dec.	16	Ballou Press cost of printing respondent's answering brief in proceeding to open decrees	19.13
Dec.	16	Ballou Press cost of printing respondent's special memorandum re exceptions	101.75
Dec.	23	Ballou Press printing respondent's reply brief	36.47
		1937	
Jan.	13	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Jan.	18	Commerce Photo-Print Corporation for photostats	.41
Jan.	22	Ballou Press, bill for additional cost of reply brief	23.50
Feb.	4	Commerce Photo-Print Corporation for photostats	.41
Feb.	5	Commerce Photo-Print Corporation for photostats	.77
Feb.	13	Thomas F. Falvey for original transcript for Surrogate and copy for counsel 51 minutes of hearing before Surrogate	98.25
Feb.	20	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Apr.	6	Pioneer Fire Proof Storage Warehouse Company, storage	101.04
May	8	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
June	11	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
July	1	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
July	27	Commerce Photo-Print Corporation for photostats	.61
Aug.	5	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Sept.	4	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Oct.	2	Pioneer Fire Proof Storage Warehouse Company, storage	50.52

Exhibit A Annexed to Answering Affidavit of Selden Bacon

Oct.	26	Walter N. Seligsberg, referee, services as per order of Surrogate of October 23, 1937	17,967.00
Oct.	27	Thomas F. Falvey for stenographer's minutes, original and copy for counsel, of hearings before Surrogate on October 8, 1937	9.00
Nov.	4	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Nov.	9	John Williamson & Sons, of Sydney, Australia, services and disbursements in 1936 in search for witness Coleman	87.20
			$229,867.35

The two starred items of June 16 and 17, 1933, in this Schedule were included in the partnership accounting approved by the Supreme Court judgment of November 8th, 1937, and are referred to in Schedule K of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2050 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Schedule C-1.

ITEMIZED STATEMENT OF ALL UNPAID CLAIMS FOR ADMINISTRATION AND OTHER EXPENSES OF THIS ESTATE.

A.

Unpaid Claims not disputed by the Executor.

2051 i. Claims for Unpaid Costs Awarded by Decree of this Court of May 15, 1937, all bearing interest from that date, payable out of the Estate

To John S. Sorenson			$ 3,523.75
To Chase National Bank, as Ancillary Executor of Thorleif S. B. Nielsen, deceased			3,523.00
To Irving Trust Company as Executor of Hermann Sielcken, deceased		$ 43,129.75	
Less sums taxed as costs, paid out of estate			
Referee's fees—Lewis	$ 7,500.00		
2052 Seligsberg	17,500.00		
and interest.			
Court Stenographer's fees	5,354.75		
Certified Copies	241.05		
Witness fees	363.95		
		30,959.75	12,170.00

(At the time of payment of the fees of the Referee W. N. Seligsberg, Esq. the accrued interest on his claim amounted to $467, so that the actual payment to him was $17,967.)

$ 19,216.75

ii. Claim of Hon. Nathan L. Miller, Counsel for Executor

For services in preparing for argument before the Surrogate, of Matter of Sielcken, on December 16th, 1936, su-

pervising preparation of briefs, and argument, as per his bill, copy of which is filed herewith ..... $ 25,000.00
For Disbursements 32.21

iii. Balance of Claims of Leonard B. Smith, of New York City, attorney and counsel for executor.
For services 2,750.00
For disbursements as per his bills, copies of which are filed herewith 47.00 2054

iv. Balance of Claims of Duer, Strong & Whitehead, of New York City, attorneys and counsel for Executor.
Their claims are for services in all the multitudinous litigation in which the executor has been involved since November, 1931; and in advising as to manifold details of the administration, including negotiations for settlement of litigation. These services include those of Mr. Selden Bacon, senior member of that firm, and are set forth in the bills presented by them to the Executor, of which copies are herewith filed. 2055
For Services 218,400.00
For Disbursements 3,007.66 221,407.66

on which there have been paid as shown in Schedule C
For Services on account .. $101,000.00
For Disbursements 2,787.27 103,787.27

leaving an unpaid balance of claim of .. $117,620.39
plus interest.

v. Claim of Williams, Eversman & Morgan of Toledo, Ohio.
Their claim is for services as local counsel in Toledo, Ohio, for this Executor in the suit instituted by Mrs. Clara Sielcken Schwarz in the Court of Common Pleas for Lucas County, Ohio, against the Wool-

2056 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

son Spice Co., this Executor and others, in which she sought to recover several million dollars. Their bill is for an unpaid balance for services	$ 4,500.00	
(Their total bill for services was $5,000, of which $500 has been paid, as shown in Schedule C.)		
and unpaid balance of disbursements .... and interest from April 30, 1937	36.59	
2057		4,536.59

Copy of their bill is herewith filed.

vi. Balance of Claim of Daniel Levy, Certified Public Accountant, New York City.

Owing to the attack in the proceeding in Matter of Sielcken on the settlement of 1917 with Sorenson and Nielsen, and the refusal of the Referee to pass on the questions of estoppel and laches affecting such claim, and other attacks in that proceeding on transactions affecting the liquidation of the affairs of Crossman & Sielcken, it was necessary to prepare before the Executor started to introduce its proofs evidence of the propriety of those transactions, including a careful showing of all relevant matters appearing on the books and records of that firm. Mr. Levy did this work and had completed the preparation of that work before the petitioner in that proceeding on September 10th, 1935, withdrew the claims she had made on those scores.

2058

Mr. Levy's charges amounted in all to $9,000, of which $8,000 has been paid, as shown in Schedule C. Balance claimed by Mr. Levy ..... $ 1,000.00

Copy of Mr. Levy's bill is filed herewith.

Total unpaid claims not disputed by executor $170,202.94
plus interest.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2059

This Executor has examined the said bills of its said attorneys and counsel, namely Hon. Nathan L. Miller, Leonard B. Smith, Esq., Duer, Strong & Whitehead, Esqs., and Williams, Eversman & Morgan, Esqs., and believes that the services therein claimed to have been rendered have all been rendered satisfactorily, and that in view of the magnitude and complexity of the matters involved and the large amount of time required to present these matters and the success attained in handling the same, such charges are reasonable and fair.

2060

The work of Mr. Daniel Levy as accountant was very elaborate and prolonged and his work which has been examined by this executor was carefully done and the amount of time consumed by him in such work was, as this executor is advised and believes, reasonably to be compensated, at the usual rates, at the sum of $9,000 claimed by him. The work so done by Mr. Levy, so far as it affected the claim of said Terijon Weitling, was put at the service of the residuary legatee in connection with her defense of that claim, and the services of Mr. Levy in connection with those items were availed of by her in such defense.

2061

B.

In Schedule D-3, in addition to disputed claims against the estate, are shown certain claims made against the executor, for services, etc., claimed to have been rendered it in the administration of the estate, which claims the Executor disputes.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2062 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Schedule D.

CLAIMS OF ALLEGED CREDITORS OF THE TESTATOR PRESENTED TO OR WHICH HAVE COME TO THE KNOWLEDGE OF THE EXECUTOR.

Claim of Terijon Weitling.

Prior to the death of Hermann Sielcken, Weitling was employed as a salesman in the Foreign Department of Crossman & Sielcken on a salary plus commissions of ten per cent of the net profits of his department.

2063 In late 1917, after the death of Sielcken, settlement was made with him and he executed a release of all claims, but, apparently, neglected to affix his seal thereto.

The claim he asserts by his action is that the 1930 recovery from the Zentral Einkaufs Gesellschaft was all profit of 1916-1917 and that he is entitled to ten per cent of the nominal amount thereof, irrespective of his release and settlement, and also irrespective of the terms of the compromise of that judgment under which a full half of the nominal recovery was repaid to the Zentral Einkaufs Gesellschaft and $50,000 thereof paid to Theodor Wille pursuant to the compromise as set forth in Schedule I hereof, and also irrespective of all expenses incurred in

2064 recovering the same.

On a first trial of his action it was dismissed by reason of releases executed by him. He appealed therefrom and was awarded a new trial on the grounds stated in the opinion of the Appellate Division on his appeal reported in 241 A. D. 377, which were in substance that the releases in question were possibly ambiguous and subject to explanation by oral evidence. On the second trial a verdict was rendered on March 5, 1937, against his claim based on the plaintiff's own evidence. From the judgment thereon entered March 10th, 1937, dismissing his action Weitling has again appealed to the Appellate Division for the First Department, and his appeal therefrom is there now pending.

The claim Weitling has advanced is for ten per cent of the gross $726,681.40 paid to Sorenson and Neilson as surviving partners of Crossman & Sielcken by the Treasurer of the United States on the 23rd day of April, 1930, in satisfaction of the decree of the United States

Exhibit A Annexed to Answering Affidavit of Selden Bacon

District Court against the Zentral Einkaufs Gesellschaft and the United States, Treasurer and Alien Property Custodian, as set forth in Schedule I hereof, irrespective of the terms of the compromise settlement under which collection was made, and irrespective of the expenses incurred in making such recovery; irrespective too of his prior releases of any such claim, and interest thereon, or approximately $104,000 and costs. Such claim is believed to be wholly invalid. 2065

In January, 1933, this Executor desired to change the attorneys who had appeared for it in this Weitling case and in the allied actions brought by the other three Export Managers, and then requested the retirement of such attorneys in those causes. The residuary legatee, Mrs. Clara Sielcken-Schwarz, desired to have the attorneys who had so appeared, continue in charge of the case, and to accomplish that result undertook with the Executor to be entirely responsible for the outcome of said four actions, and for the subsequent expenses of all that litigation, she to have the privilege of herself employing such attorneys and counsel in those four cases as she saw fit. Since that date that litigation has been entirely conducted by her under and pursuant to that arrangement. 2066 2067

The other three "Managers' suits," of Budelman, Kirkpatrick and James W. Smith, the said Clara Sielcken Schwarz settled after the first judgment against their claims, by paying them $10,000 each, and taking releases from them. The executor at her request made distribution to her of those amounts for that purpose, as more fully appears in Schedule F hereof.

Weitling in his complaint claimed, as this executor is informed and believes, a preference for any recovery he may make on all the assets received by the executor from the firm of Crossman & Sielcken, as an alleged debt of that firm, all other indebtedness of the firm having been discharged.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2068 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Schedule D-1.

STATEMENT OF CLAIMS ON WHICH JUDGMENT OR DECREE HAS BEEN RENDERED AGAINST YOUR ACCOUNTANT.

The only claims on which any Judgment or Decree has been rendered against your accountant are the two following:

2069 (a) Claim of the United States for an alleged deficiency in income taxes for the years 1930 and 1931 predicated on the recoveries from the Zentral Einkaufs Geselischaft and under the Award of the Mixed Claims Commission—United States and Germany, on the claim against Germany and the firm of Theodor Wille. The Internal Revenue Department of the United States assessed on November 27th, 1933, a deficiency in income taxes for those years of $141,962.58 and interest thereon at 6% from March 15, 1931, on $122,631.18 and from March 15, 1932, on $19,331.40 amounting in the aggregate at the time the claim was finally disposed of to approximately $182,000. From that assessment for a deficiency in income taxes
2070 the executor appealed to the United States Board of Tax Appeals, where that appeal was heard and argued. After the case had been argued the United States offered to compromise its said claim for about $182,000, for the sum of $22,192.65. This offer was accepted by the Executor with the approval of the residuary legatee and her counsel, and by stipulation between the United States and this Executor a decree was entered by the said Board of Tax Appeals, awarding a deficiency tax against the Executor and in favor of the United States of $18,500 and interest from March 15th, 1931, which decree of the Board of Tax Appeals was entered on the 11th day of July, 1934; and the Executor paid the same including the interest out of the Estate in its hands on the 12th day of July, 1934, as shown in Schedule C hereof, the decree with interest to the day of payment amounting to $22,192.65.

(b) In the Weitling case the Appellate Division in reversing the first judgment against Weitling awarded costs

to abide the event of the action by its order of reversal of date June 15th, 1934. As, on the second trial, judgment was again awarded against Weitling, no sum of costs has been awarded against the executor.

If ultimately any judgment ever be recovered by Weitling the residuary legatee has assumed all responsibility therefor. Any such judgment if any be recovered will run against the Executor and it should be protected accordingly under the refunding bonds and deposit securing the same set forth in Schedule A-3. 2072

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

Schedule D-2.

PERSONAL CLAIMS OF THE ACCOUNTING PARTY AGAINST THE ESTATE.

2073

None, except for its commissions of which computation is set forth in Schedule J and claims to recover under the refunding bonds set forth in Schedule A-3 for sums sufficient to meet unpaid obligations of the Estate; and for the unpaid costs awarded it by the decree of this Court of May 15, 1937, set forth in Schedule C-1 hereof.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2074 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE D-3.

CLAIMS DISPUTED BY EXECUTOR, AND SUBMITTED FOR THE COURT'S DECISION.

In addition to the claim of Terijon Weitling against the firm of Crossman & Siecken set forth in Schedule D, the following claims are asserted against the executor and are disputed by it.

2075

a) *Claim of Dr. Arthur Burchard, a member of the German bar, resident in New York City, employed to investigate and testify as to certain features of the German law of Wills, in Matter of Sielcken.*

Total Claim	$2,580.00
Already paid, as shown in Schedule C	1,500.00
Balance claimed	$1,080.00

Dr. Burchard was employed with the agreement that he should be paid $15 an hour for all time necessarily
2076 employed in the matter for thoroughly investigating and testifying as to certain features of the German law bearing on the validity of the so-called "Joint Testament" signed by the said Herman Sielcken and his wife the said Clara Sielcken Schwarz in February, 1917, in the case of Matter of Sielcken.

Dr. Burchard claims to have spent 172 hours in the matter. The Executor, while unable to contradict Dr. Burchard's assertion that he spent this amount of time, believes that a large amount of the time so spent by him (according to his statement) was spent on questions of general German law not so submitted to him, and immaterial to those questions; and believes that the time necessarily employed by him on the subjects he was asked to investigate, was fully compensated at the agreed rate of $15 an hour, by the payments already made him aggregating $1,500.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2077

The executor prays that he be cited to give him opportunity to present his claim and proofs thereof, and that this court determine the proper amount of his claim.

b) *Claim of Mildred Elfenbein as surviving partner of the firm of Maurice J. Elfenbein & Co. for services as Accountants.*

This claim is now pending in an action in the Supreme Court for New York County instituted by the claimant 2078
against John S. Sorenson, Clara Sielcken Schwarz, Brainard Avery and this Executor.

This executor denies that it ever employed the Elfenbeins or either of them and denies that they or either of them ever rendered any services to this executor or this estate.

Moreover such services as the plaintiff in that action seeks to recover for, this Executor maintains, were rendered in hostility to this executor and the estate pursuant to an employment by John S. Sorenson (said John S. Sorenson at that time was claiming to be entitled to recover 12 1/2 per cent of the recoveries of 2079
1930 in the action against the Zentral Einkaufs Gesellschaft and others and the award of the Mixed Claims Commission, and also claiming to be entitled, as sole surviving partner of the former firm of Crossman & Sielcken, to liquidate the assets and affairs of that firm, instead of this executor).

Both of those claims of said Sorenson were held invalid by the judgment of the Supreme Court for New York County entered on November 11th, 1933, in the Chase National Bank action, mentioned in Schedule A-1 of this Account.

Such services of the said Elfenbein & Co. had been rendered in support of the said claims of said Sorenson which were so disallowed.

Prior to the decision in the Chase National Bank action said Sorenson had given said Elfenbeins a note

2080 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

to cover their services, signed by him as *surviving partner* of Crossman & Sielcken.

That note the Elfenbeins endorsed without consideration to one Rosenblum, who, on the strength of service of summons on Sorenson (as surviving partner), entered a default judgment on said note, and then sought to enforce the same against the assets that had come from the partnership to this Executor, which then brought an action in the Supreme Court in which the said judg-
2081 ment so obtained by Rosenblum was set aside as covinous.

Subsequently, the active partner in said Elfenbein firm died, and the surviving partner instituted the pending action. In that action said Brainard Avery has been examined as a defendant before trial, by the plaintiff and has testified, on such examination, that before most of the alleged services were rendered, the said Elfenbein & Co. were in terms notified by him that the Executor had declined to employ them; and also there testified that the said Elfenbein & Co. asserted that if this Executor would not pay
2082 them, they would use the information they had acquired in investigating the claim of said Sorenson, in other quarters, and that the data prepared by said Elfenbeins were subsequently used in hostility to the Executor in support of the suits instituted against the Executor by the Four Export Managers, each of whom claimed to be entitled to ten per cent of the recovery from the Zentral Einkaufs Gesellschaft and sued therefor. Three of those claims were adjudged invalid and the three claimants subsequently executed releases of their claims The fourth of those Four Managers (Weitling), still attempts to assert his claim as shown in Schedule D.

The Elfenbein claim is believed wholly baseless as far as concerns this executor.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2083

c) *Claim of Alexander Wendroth Sielcken, son of residuary legatee, for a balance of $30,000 and interest thereon for services rendered by him in connection with the recoveries from the Zentral Einkaufs-Gesellschaft and under the Award of the Mixed Claims Commission—United States and Germany—against Germany and the firm of Theodor Wille.*

This claim has never been presented formally as a claim against the Estate or the Executor. 2084

Alexander Wendroth Sielcken was not employed by the Executor to render those services, but by his mother, the residuary legatee, who had undertaken to assert those claims entirely at her own expense.

She did request the Executor to pay $60,000 to him for those services, and the Executor on November 11th, 1930, paid him the sum of $30,000 for them on her account, and has charged the same in Schedule F hereof as a distribution to her as residuary legatee.

This executor wholly rejects such claim as a claim against it or the estate. And further alleges that the payment of $30,000 so made to him on November 11th, 2085
1930, fully covered the value of all services so rendered by him, and more than six years have expired since the rendition of such alleged services and no proceeding to recover same has been brought by him.

d) *Claim of Clara Sielcken Schwarz asserted in the Court of Common Pleas for Lucas County, Ohio:*

In that proceeding said Clara Sielcken Schwarz claimed to have been defrauded by the conduct of this Executor in selling some 824 shares of Woolson Spice Company stock in 1918 to the extent of three million dollars or more.

The sale of those shares by the Executor was confirmed by the decree of this Court of July 7th, 1921, which decree said Clara Sielcken Schwarz sought to vacate in a proceeding in this court, which this Court re-

fused to vacate by its decree of May 15, 1937, which latter decree is now final.

Since the dismissal of her appeal from the decree of May 15th, 1937, counsel for Mrs. Clara Sielcken Schwarz have advised this executor that they propose to abandon the Ohio suit and negotiations for its dismissal on the merits are now pending and are expected to culminate in such dismissal very shortly, and papers providing for such dismissal have been approved by coun-
2087 sel, and sent to Mrs. Sielcken-Schwarz in Germany, for execution by her.

The refusal of this court to vacate its decree of July 7th, 1921, confirming the said sale is believed to be a complete bar to any recovery against this executor by said Clara Sielcken Schwarz in that Ohio suit.

Unless this suit be abandoned as contemplated, the executor may be subjected to further expenses for its defense therein.

e) *Claim of Clara Sielcken Schwarz for reimbursement of sums paid by her for storage of books and pa-*
2088 *pers of Crossman & Sielcken.*

Early in 1925 the affairs of the partnership being supposedly fully liquidated, the executor surrendered to Mrs. Clara Sielcken Schwarz, as residuary legatee, the bulk of the books and papers of the firm of Crossman & Sielcken. She stored these in the Pioneer Warehouses in Brooklyn, and in February, 1935, presented a claim against this executor for storage that she paid up to January 16, 1935, for one room, and up to February 1, 1935, for a second room amounting in all to $5,132. As these books were taken over and retained by Mrs. Sielcken, who asserted her possession thereof as against any right of the executor thereto, this executor refused to pay her said claim, and now disputes the same as a sum not due from the executor.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2089

f) *Claim of Pioneer Warehouses for Storage.*

After Feburary, 1935, Mrs. Sielcken refused to pay the Pioneer Warehouses for the storage of these books and papers and the Pioneer Warehouses has asserted a claim against the executor for the rental of these rooms at $28 per month for one of them from April 1, 1935, and at $15 per month for the other from March 16, 1935. To December 16, 1937, these claims amount to $1,434. The executor disputes this claim and denies 2090
responsibility for the storage of these documents in those rooms, which have not been under its control during either the period when Mrs. Sielcken Schwarz paid the storage thereon, or the period since then for which the Pioneer Warehouses claim compensation.

g) *Possible claim of the Tax Commission of the State of New York for an additional transfer tax on the Estate of Hermann Sielcken, deceased, by reason of the additional value of the estate's interest in the firm of Crossman & Sielcken due to the items of assets of that firm first discovered in 1927 and re-* 2091
covered in 1930.

No such claim has been so far asserted by the Tax Commission. Whether one will be or not is uncertain. The circumstances affecting any such possible claim are set forth in Schedule I of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

2092 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE E.

CLAIMS OF CREDITORS PAID BY EXECUTOR SINCE MARCH 17TH, 1927.

NONE.

Note. (The only sums paid on account of any such claims were the following sums paid by the residuary
2093 legatee personally, in settlements of four suits, all responsibility for three of which had been assumed by her. As to the fourth suit (Stewart), she individually was a defendant as well as the executor, and she individually made a settlement with the plaintiff in that suit entirely on her own responsibility, as the executor was advised and believed that the claim against the Estate was without merit, and that it had a complete defense thereto, as shown by its answer in that suit.

The funds which she used in making these settlements of these suits were, however, distributed to her as legatee at her request by the executor, and are charged as
2094 payments to her in Schedule F. These sums were

1933			
Apr.	27	Stewart (part of $14,000 check)	$10,000
Sept.	12	Budelman	10,000
Sept.	12	Kirkpatrick	10,000
Sept.	12	J. W. Smith	10,000

There were also the sums allowed in the settlement of the claims asserted against Zentral Einkaufs Gesellschaft and against Theodor Wille and the German Reich, set forth in Exhibit A-1. These have not been charged to the Estate, but the settlement and the allowance thereby made were approved by the judgment of the Supreme Court for New York County of November 8th, 1937, on the partnership accounting before it.)

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2095

SCHEDULE F.

PAYMENTS TO RESIDUARY LEGATEE, OR TO OTHERS FOR HER ACCOUNT AND AT HER REQUEST, CHARGED TO HER AND CREDITED TO EXECUTOR.

1927			
Mar.	Check to residuary legatee, Clara Sielcken Schwarz	$1,976.87	
Nov. 26	George Osborne for Notarial certificates for Mixed Claims Commission	11.25 ~~11.26~~	2096
1930			
May 14	Arthur Terry for accountant's services to legatee re claims before United States District Court and Mixed Claims Commission —United States and Germany	127.50	
May 14	William Martin for accountant's services to legatee re claims before United States District Court and Mixed Claims Commission —United States and Germany	375.00	
May 21	Clara Sielcken Schwarz for expenses re United States District Court suit and Mixed Claims Commission cases	61,657.94*	2097
June 19	Barnes, Avery & Whiting account legal services to Clara Sielcken Schwarz in same cases	100,000.00*	
June 27	William Martin account Accountant's services to Clara Sielcken Schwarz in same cases	364.50*	
June 28	Arthur Terry account Accountant's services to Clara Sielcken Schwarz	60.00*	
Aug. 13	Photostats for Clara Sielcken Schwarz	8.80*	
Nov. 5	Avery & Whiting account legal services to Clara Sielcken Schwarz re recoveries of 1930, etc.	56,000.00*	
Nov. 5	William Martin account Accountant's services to Clara Sielcken Schwarz	2,000.00*	
Nov. 5	John S. Sorenson account services to Clara Sielcken Schwarz re claims in United States District Court and before Mixed Claims Commission	4,000.00*	

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	Nov. 5	Avery & Whiting (to remit to Fred Wirth) for services re claims in United States District Court and before Mixed Claims Commission	2,000.00*
	1930		
	Nov. 11	Alex. W. Sielcken for services to Clara Sielcken Schwarz re claims in United States District Court and before Mixed Claims Commission	$30,000.00*
2099	Nov. 14	Photostats of T. S. B. Nielsen letter of November 11, 1930	2.00*
	1931		
	Feb. 4	Chase National Bank for account residuary legatee	238,616.60
		Chase National Bank for account residuary legatee (United States Treasury Notes with all unpaid coupons)	100,000.00
	Feb. 5	William Martin for Accountant's services to legatee	1,027.58
	Feb. 16	William Martin for Accountant's services to legatee	228.75
2100	1931		
	Mar. 14	Barnes, Avery & Whiting, services to Clara Sielcken Schwarz (part of $5,000 check)	650.00
	Mar. 31	Alexander Wendroth Sielcken, services to Clara Sielcken Schwarz	10,000.00
	Apr. 4	Avery & Whiting, services to Clara Sielcken Schwarz re Sorenson claims	12,500.00
	Apr. 9	William Martin, Services as Accountant re Mixed Claims Commission	316.00
	Apr. 28	Barnes, Avery & Whiting for legal services re 1930 recoveries	39,999.20
	May 2	Price, Waterhouse & Co., services as Accountant re Mixed Claims Commission	821.26
	May 23	William Martin, services as Accountant re Mixed Claims Commission	657.25
	June 22	Universal Audit Co., services as Accountant re Mixed Claims Commission	162.50
	July 9	William Martin, services as accountant	481.40

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2101

July	24	William Martin, services as accountant	495.75
Oct.	19	William Martin, services as accountant	1,000.00
Nov.	12	Avery & Whiting, services to Clara Sielcken Schwarz	5,000.00
Dec.	10	William Martin, services to Clara Sielcken Schwarz as accountant	1,915.18
1932			
Jan.	4	Newton D. Baker, legal services to Clara Sielcken Schwarz and disbursements	2,754.47
Jan.	8	Barnes, Avery & Whiting, account services re 1930 recoveries	30,279.47*
		Tibbets, Lewis & Rand	3,000.00*
Jan.	8	Clara Sielcken Schwarz	3,000.00
Mar.	1	William Martin, services as accountant to Clara Sielcken Schwarz	2,819.25
Mar.	12	Avery & Whiting (Part of check for $2,168.81)	1,729.77
June	13	William Martin, services as accountant to legatee	1,074.74
June	14	Avery & Whiting, part of check for $887.99	348.35
		Avery & Whiting, for legal services to Clara Sielcken Schwarz	5,000.00

2102

2103

1933			
Feb.	8	Clara Sielcken Schwarz	10,000.00
Apr.	27	Clara Sielcken Schwarz ($10,000 for use by her in Stewart settlement)	14,000.00
June	9	Benjamin N. Goodglass, for reporting examination before trial in Four Managers' suits, expense assumed by Clara Sielcken Schwarz	543.00
Aug.	11	Olcott, Paul & Havens, fees for services in Four Managers suits, assumed by Clara Sielcken Schwarz	2,500.00
Sept.	12	Gregory, Stewart & Montgomery, attorneys for Budelman, Export Manager, Settlement payment for account Clara Sielcken Schwarz	10,000.00
Sept.	12	Gregory, Stewart & Montgomery, attorneys for J. E. Smith, Export Manager, settlement payment for account Clara Sielcken Schwarz	10,000.00

2104 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

	Gregory, Stewart & Montgomery, attorneys for Kirkpatrick, Export Manager, settlement payment for account Clara Sielcken Schwarz	10,000.00
1933 Sept. 28	Tibbetts, Lewis & Rand, services to Clara Sielcken Schwarz re Three Name Account	2,500.00*
	Total	$782,004.39

2105 NOTE. The starred items in this Schedule F appeared in the partnership accounting and were approved by the judgment of the Supreme Court of November 8th, 1937. They are starred here because of the later references thereto in Schedule K of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

2106

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2107

SCHEDULE G.

PROPERTY REMAINING IN THE HANDS OF YOUR ACCOUNTANT.

Cash		$ 435.59
Uncollected balance of Award of Mixed Claims Commission, shown in Schedule B-1		
Principal	$211,992.88	
Interest to March 31, 1937 (and subsequently accruing interest)	180,389.55	2108
Total		$392,818.02

In addition the Executor holds the refunding bonds, shown in Schedule A-3, to meet obligations of the estate.

The above-mentioned balance of award of the Mixed Claims Commission is at present uncollectible and its value problematical as shown in Schedule B-1.

December 1, 1937.

IRVING TRUST COMPANY, 2109
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2110 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE H.

List of Legatees, Claimants, Etc.

The only person now entitled as legatee, trustee, surviving spouse, devisee, distributee or otherwise to a share of the estate or fund, is Clara Sielcken Schwarz, widow of the Testator. This accountant is informed and believes that she now resides at Buena Vista Avenue, Rumson,
2111 Monmouth County, New Jersey. She has, as this executor is informed and believes, been absent in Germany for many months, where her post office address is "Klopstockstrasse 3, Sontenay, Hamburg, Germany."

She is entitled as residuary legatee to all remaining estate after satisfaction of all claims against it.

The approximate value of her interest in the estate as such legatee is nothing.

She is of full age, competent and *sui juris*.

The records of this court have been searched for powers of attorney and assignments and incumbrances made or executed by her, and no such document has been
2112 found.

Various powers of attorney have from time to time been given, as this executor is informed and believes, by said Clara Sielcken Schwarz to August Kern, whose office address is 14 Wall Street, New York City, to Alexander W. Sielcken, whose office address is 11 West 42nd Street, New York City, and (by substitution) to George E. Warren, whose office address is care of The Chase National Bank of the City of New York, 18 Pine Street, New York City, but none of these powers of attorney, so far as this executor is informed and believes, or has been able to learn, have contained any power to the attorney thereby appointed to sell, transfer or encumber any interest of the residuary legatee in this estate.

Other legatees named in the Will were:

John S. Sorenson, a legacy of $50,000; Thorleif S. B. Nielsen, a legacy of $50,000; both of which legacies were paid in 1921 and their receipts and releases were

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2113

filed in this Court in 1925, prior to the third accounting herein, as appears on the face of that account.

The Josephinen Heim of Baden-Baden, Germany, which renounced its legacy by written instrument duly filed in this court with and at the time of the second account of this executor, 1922.

The City of Baden-Baden, Germany, which renounced its legacy by a written instrument duly executed and acknowledged and filed in this Court with the third ac- 2114
count of the executor, in 1925.

Other additional legatees named in the will were Lina Kraft, Heinrich Seidel and the Chief-Gardner Brinkman; all legacies to them were however on condition that they be still in the employ of the testator at the time of his death. Each of these legacies lapsed because no one of the three was in the employ of the testator at the time of the testator's death, as was shown upon the second accounting herein, as of January 1st, 1922.

CLAIMANTS— 2115

Alleged Creditor of Decedent.

Terijon Weitling, not a relative of decedent, whose post office address is 195 Fingerboard Road, Staten Island, New York, whose claim has been adjudged invalid, by judgment entered in the office of the Clerk of the County of New York on the 15th day of June, 193, but who has appealed to the Appellate Division for the First Department from the judgment dismissing his action. His interest in the estate is believed to be 0

Claim against the Executor and the Estate.

Possible claim of the State Tax Commission of the State of New York, not a relative of

2116 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

the decedent, whose address is Albany, N. Y., for an additional transfer tax. The amount of this claim, if any, is believed to be 0

Undisputed Unpaid Claims.

John S. Sorenson, not a relative of decedent, whose address is 757 Carroll Street, Brooklyn, New York $ 3,523.75
2117 and interest from May 15, 1937.

The Chase National Bank of the City of New York, as Ancillary Executor of Thorleif S. B. Nielsen, deceased, not a relative of decedent, whose address is 18 Pine Street, New York City $ 3,523.00
and interest from May 15, 1937.

Irving Trust Company, not a relative of decedent, whose address is 1 Wall Street, New York City $ 12,170.00
and interest thereon from May 15, 1937.

2118

The three last above items are for unpaid costs awarded by this Court payable out of the estate, by its decree of May 15, 1937.

Hon. Nathan L. Miller, not a relative of decedent, whose address is 15 Broad Street, New York City $ 25,032.21
with interest from July 1, 1937.

Leonard B. Smith, not a relative of decedent, whose address is 230 Park Avenue, New York City $ 2,797.00

Duer, Strong & Whitehead, not relatives of decedent, whose address is 15 Broad Street, New York City $117,620.39
with interest on $113,461.44 from May 18, 1937.

Williams, Eversman & Morgan, not relatives of decedent, whose address is Second National Bank Building, Todedo, Ohio $ 4,536.59

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2119

with interest from April 30th, 1937.

Daniel Levy, not a relative of decedent, whose address is Knickerbocker Building, Broadway and 42nd Street, New York City $ 1,000.00

Claims Against the Executor Disputed by It.

Dr. Arthur Burchard, not a relative of decedent, whose address is 501 Fifth Avenue, New York City $ 1,080.00 2120

Mildred Elfenbein, as surviving partner of the firm of Maurice J. Elfenbein & Company, care of Samuel Weinstein, Esq., 225 Broadway, New York City $ 8,735.00
and interest from October 30, 1930.

Alexander Wendroth Sielcken, adopted son of decedent, but claiming only as creditor, whose address is 11 West 42nd Street, New York City $ 30,000.00

Clara Sielcken Schwarz, widow and residuary legatee, address Klopstockstrasse 3, Sontenay, Hamburg, Germany, claim asserted in the Court of Common Pleas for Lucas County, Ohio. This claim it is believed is being withdrawn 0 2121

A second claim by Clara Sielcken Schwarz (address as above stated) to be reimbursed sums paid by her for storage $ 5,132.00

Pioneer Warehouses, no relation to decedent, whose address is 41 Flatbush Avenue, Brooklyn, New York, claim for storage $ 1,434.00

CLAIMANTS OF FUND ON DEPOSIT IN THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK TO SECURE REFUNDING BONDS.

The Chase National Bank of the City of New York, not a relative of decedent, whose address is 15 Broad Street, New York City; claim for commissions as depositary of fund Amount unknown.

2122 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Claimants of interests in the Fund so on deposit in the Chase National Bank, but subject to rights of this Executor therein.

Emilie Bender and Brainard Avery as substituted Trustees (in place of New York Trust Co.), no relation to decedent, their post office address is care of Avery & Whiting, Esqs., 100 Broadway, New York City, about $20,000.00

2123

The following named persons make claims against the balance of said fund under a blanket assignment thereof as security for the aggregate sum of $200,000:

Brainard Avery, not a relative of decedent, whose post office address is 100 Broadway, New York City.

Howard Hasbrouck, not a relative of decedent, whose post office address is 100 Broadway, New York City.

George W. Alger, not a relative of decedent, whose post office address is 50 Broadway, New York City.

2124 I. Gainsburg, not a relative of decedent, whose post office address is 40 Wall Street, New York City.

Isaac H. Levy, not a relative of decedent, whose post office address is 70 Pine Street, New York City.

Newton D. Baker, not a relative of decedent, whose post office address is 1956 Union Trust Building, Cleveland, Ohio.

Raymond T. Jackson, not a relative of decedent, whose post office address is 1956 Union Trust Building, Cleveland, Ohio.

Harold W. Fraser, not a relative of decedent, whose post office address is 710 Home Bank Building, Toledo, Ohio.

Charles H. Kelby, not a relative of decedent, whose post office address is 70 Pine Street, New York City.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2125

John G. Saxe, not a relative of decedent, whose post office address is 102 Maiden Lane, New York City.

Joseph M. Proskauer, not a relative of decedent, whose post office address is 11 Broadway, New York City.

Leonard P. Moore, not a relative of decedent, whose post office address is 25 Broadway, New York City.

James D. Miller, not a relative of decedent, whose post office address is 7 Dey Street, New York City.

2126

William Martin, not a relative of decedent, whose post office address is 117 Liberty Street, New York City.

Charles D. Hamel, not a relative of decedent, whose post office address is Shoreham Building, Washington, D. C.

Bank of Valley Stream, no relation to decedent, whose address is c/o Superintendent of Banks, 80 Centre Street, New York City.

Superintendent of Banks of the State of New York, no relation to decedent, whose address is 80 Centre Street, New York City.

2127

Marie F. Barnes, as Executrix of Earl B. Barnes, deceased, no relation to decedent, claims an interest in sums that may be recovered by Brainard Avery, her post office address is 145 Beaumont Street, Brooklyn, New York.

All of the above named persons are of full age, competent and *sui juris*.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

2128 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE I.

STATEMENT OF ESTATE AND TRANSFER TAXES PAID SINCE THE PREVIOUS ACCOUNTINGS.

NONE

As shown in Schedule C, certain income taxes amounting to $22,192.65 were paid to the United States. No
2129 other taxes have been paid on the estate since the last prior accounting. There may however be a

Possible Claim of Tax Commission of the State of New York against the Estate of Hermann Sielcken for an additional Transfer Tax on the Estate by reason of Additional Realization on the Estate's Interest in the Assets of the Firm of Crossman & Sielcken due to the Discovery of additional Assets of that Firm in May, 1927, until then entirely unknown to the Executor.

No such claim has yet been asserted by the State Tax
2130 Commission, and if any be asserted it will be disputed by the executor.

The interest of this estate in the firm of Crossman & Sielcken was appraised as an entity in the report of the Tax Appraiser by the decrees of this Court of November 21st, 1919, and November 27th, 1923, at a total of $4,299,579.27. Transfer taxes were accordingly fixed by those orders and were fully paid by the executor prior to 1924 as shown by its prior accountings herein.

By the terms of the copartnership articles, the executor of Hermann Sielcken, upon the dissolution of that firm, was entitled, and charged *as such executor* with the duty of liquidating the firm's affairs, to the exclusion of the surviving members of the firm, John S. Sorenson and Thorleif S. B. Nielsen. The liquidation was so conducted; and that the executor had this right and duty was finally adjudged by the Supreme Court in the case of Chase National Bank of the City of New York as

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2131

ancillary executor of Thorleif S. B. Nielsen against John S. Sorenson, the Irving Trust Company as executor of Hermann Sielcken, and Clara Sielcken Schwarz, by judgment entered on November 11, 1933, in the office of the clerk of the county of New York.

On March 18, 1927, it was believed by the executor that the entire interest of the estate in the firm of Crossman & Sielcken had been fully realized on and all debts of that firm paid and the firm fully liquidated. Late in March, 1927, as of March 18, 1927, the executor rendered its voluntary account (since approved by judgment of the Supreme Court for New York County entered on November 8, 1937) and such voluntary accounting was intended as a final account of the estate.

2132

Except for the unknown claims of the firm of Crossman & Sielcken mentioned below, the only assets of the estate remaining or subsequently coming to the hands of the executor on that accounting were a refund of $32.80 from the clerk of the United States Supreme Court shown in Schedule A, one-half of which belonged to and was returned to Mr. McMaster, as shown by the first item in Schedule C; and the cash balance on hand on March 18, 1927, of $1,976.87, shown in Schedule A, which was paid to Mrs. Sielcken Schwarz in March, 1927, as shown in Schedule F.

2133

At that time, after deducting firm losses and the expenses of liquidating the business of the firm, the estate had realized as its share of the firm assets as of the death of the testator, the total sum of $4,059,684.01, as shown by the following tabulation:

Total amount realized from this asset up to March 18th, 1927, omitting income accruing after testator's death and after deducting firm debts and expenses of liquidation of firm	$4,125,094.00

2134 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

	Less commissions awarded to the executor on sums received and paid by it in the course of its liquidation of the firm (a duty imposed on the executor of Sielcken by the articles of co-partnership) consisting of			
	Total commissions awarded by			
2135	decrees of July 7, 1921	$34,055.48		
	of July 11, 1922	16,341.00		
	and February 9, 1925	24,835.23		
	and on voluntary accounting,	502.34	$75,734.05	
	Less commission on other assets of estate, including income	$ 9,564.91		
	and less over-computation of commissions in decree of February 9, 1925, later voluntarily returned by executor	759.15	10,324.06	65,409.99
2136	Estate's realization from this asset in March, 1927			$4,059,684.01

As against the assessed valuation of this asset on which the transfer taxes were paid, of $4,299,579.27

The realization by the estate from this asset up to May 1937 when it had, supposedly, been completely realized on, had been $4,059,684.01

Leaving an actual margin of *over-appraisement* of that asset (without taking into consideration the additional firm assets discovered in May 1927 and realized on in 1930 and 1931) of $ 239,825.26

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2137

In May, 1927, subsequent to the rendition of the voluntary account and its approval by her, the sole residuary legatee, Clara Sielcken Schwarz, then the only person interested in the estate, other than this Executor, announced that she had discovered certain additional assets of the firm of Crossman & Sielcken, which had been until then wholly unknown to this executor and which were not shown on the firm books or in its files, consisting of two certain claims (which she asserted belonged to the former firm of Crossman & Sielcken, of whose assets the decedent's estate was then the sole owner) all evidences 2138
of which were in Germany, one against the Zentral Einkaufs Gesellschaft a German governmental corporation, and the other against the firm of Theodor Wille of Hamburg, Germany.

Without revealing to the Executor the exact nature of these claims, Mrs. Sielcken Schwarz then arranged with the Executor, which then held no funds available for that purpose, that she would prosecute these claims in its name (or otherwise as she might be advised), at her own cost and by such attorneys as she might employ for that purpose. 2139

Pursuant to this arrangement she, about November, 1927, brought a suit in the United States District Court for the Southern District of New York in the names of Thorleif S. B. Nielsen and John S. Sorenson, as surviving members of the said former firm of Crossman & Sielcken against said Zentral Einkaufs-Gesellschaft, and the Alien Property Custodian and the Treasurer of the United States (which two officials then held very large sums belonging to said Zentral Einkaufs-Gesellschaft), and on the 30th day of December, 1929, obtained and entered a decree of that Court in that suit awarding to the plaintiffs therein (Sorenson and Nielsen as surviving partners of Crossman & Sielcken) the sum of $716,160.37 against said Zentral Einkaufs-Gesellschaft, and directing that it be paid by the defendants Alien Property Custodian and Treasurer out of property of said Zentral Einkaufs-Gesellschaft in their hands.

2140 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Concurrently with that suit, she had instituted a proceeding before the Mixed Claims Commission—United States and Germany, against Germany and the Zentral Einkaufs Gesellschaft, in the joint names of Sorenson, Nielsen and this executor, upon the same claim that was set up in the District Court suit. This proceeding was withdrawn as part of the 1930 compromise described below.

About the same time that she began those proceedings
2141 she also instituted a proceeding before the Mixed Claims Commission—United States and Germany, in the joint names of said Nielsen, said Sorenson and this Executor (as the sole persons interested in the claim), against Germany and the firm of Theodor Wille of Hamburg, Germany, to recover several millions of dollars.

In the spring of 1930, the time to appeal from the said decree of the United States District Court had not expired, and there was most serious question whether it was not reversible for error as to the right of Sorenson and Nielsen to maintain the suit as plaintiffs; and the claims against Germany and the firm of Theodor Wille
2142 were being disputed; the said Clara Sielcken Schwarz, then, with the approval of this executor, on March 27, 1930, entered into a compromise of all these three claims, by which no appeal should be taken from the said decree of the United States District Court, and that judgment should be paid, and the claim before the Mixed Claims Commission—United States and Germany, against Germany and the Zentral Einkaufs Gesellschaft should be discontinued and dropped; and in addition an award should be made by the said Mixed Claims Commission on the claims before it against Germany and the firm of Theodor Wille, to the said claimants before it, of the sum of $558,827.85 and interest thereon at 5 per cent per annum from April 1, 1918. Such award was accordingly made by the Mixed Claims Commission—United States and Germany, to said Nielsen, said Sorenson and this executor on April 21, 1930.

By the terms of that compromise it was further provided that one-half of the sum recovered under that

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2143

District Court decree should be paid over by the plaintiffs in that suit to the Zentral Einkaufs Gesellschaft, and that $50,000 additional should be paid, out of their half of that recovery, by the plaintiffs, to the firm of Theodor Wille; and that an expense of $200 connected with the transfer from Washington to New York of the United States Treasury 3½ per cent notes received in part payment of that decree, should be shared $100 by the plaintiffs in that suit and $100 by the said Zentral Einkaufs Gesellschaft. 2144

A true and correct copy of such compromise agreement is hereto annexed marked Exhibit A and hereby made a part of this Schedule I.

In accordance with such compromise agreement, full payment of the sum awarded by said District Court decree and accruing interest thereon from the date of the decree was made in April, 1930, to Thorleif S. B. Nielsen and John S. Sorenson as surviving members of Crossman & Sielcken (the plaintiffs in that suit), as follows:

In United States Treasury 3½% Notes	$459,200.00	2145
In Cash	267,481.40	
Total		$726,681.40

This sum of $726,681.40 represented

principal of claim	$380,761.54
interest to date of decree	335,398.83
interest after decree	10,521.03
	$726,681.40

Of the $335,398.83 interest included in the judgment $278,889.94 accrued subsequent to the death of Hermann Sielcken on October 8th, 1917. The amount of the claim sustained by the court was thus at Sielcken's death $437,270.43, or 61½ per cent of the amount of the judgment.

Out of the sums so received, there was paid in accordance with such compromise:

2146 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

The expense of bringing the securities to New York		$ 200.00
To Zentral Einkaufs-Gesellschaft:		
In said United States Treasury Notes	$229,200.00	
Cash as owelty on the division made of the Treasury notes	400.00	
Half the $267,481.40 cash received (less $100. half the expenses of bringing the securities to New York	133,640.70	363,240.70
2147 To Theodor Wille		50,000.00
		$413,440.70

Leaving as the gross recovery by the firm from this claim as per such compromise:

Cash (deposited in the Three Name Account)	$ 83,240.70
United States Treasury 3½% notes (delivered to the Executor)	230,000.00

The Wille claim, pursuant to such compromise, resulted in an award to Sorenson, Nielsen and this Executor jointly, by the Mixed
2148 Claims Commission—United States and Germany, of date April 21st, 1930, of:

Principal as of April 1, 1918	$558,827.85
Interest from April 1, 1918 to January 1, 1928	272,524.27
Total	$831,352.12

Discounting the $558,827.85 of April 1, 1918, as of October 8th, 1917, we have a face value of the principal awarded as of the death of Sielcken of $543,274.71 (or 65⅓ per cent of the total award of $831,352.12) as the amount of the claim at the time of Sielcken's death.

All payments so far made on account of this award have been applied by the United States Treasurer upon this sum of $831,352.12 and none on subsequently accruing interest.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2149

From each such payment made by him the Treasurer of the United States deducted his statutory commission of one-half per cent before remitting.

The payments so made are as follows:

1930	Credit Against Award	Treasurer's Commission	Actual Payment Received
June 2	$468,713.25, less ½%	$2,343.56	$466,369.69
Nov. 12	$ 43,516.66, less ½%	$ 217.58	43,299.08
1931			
Apr. 28	$ 28,721.00, less ½%	$ 143.61	28,577.39
1932			
Jan. 8	$ 78,408.33, less ½%	$ 392.04	78,016.29
	(This last warrant for $78,408.33 was issued October 9th, 1931 but Mr. Sorenson refused to endorse it until January 8th, 1932.)		
	The balance of this award remains wholly unpaid. The statement from the United States Treasury Department of November 22nd, 1937 shows a balance of the original amount of the award still due of		$211,992.88
	plus interest therein accumulated to March 31, 1937, of none of which has been paid.		180,389.55

2150

2151

No later statement has been received from the Treasury Department and no further payment has been made on this award. Whether any further payments will ever be received is highly problematical. (See letter from the Treasury Department in Schedule B-1.)

All the cash so received in the settlement on both claims was deposited with the Irving Trust Company (as bank

2152 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

and not as executor) to the credit of said Sorenson and said Nielsen, but withdrawals therefrom could be made only by checks countersigned by the Executor. This Bank account is commonly called the "Three Name Account."

Sorenson and Nielsen's Executor (Nielsen died in September 1930) claimed to be each entitled to 12½ per cent of both these recoveries, as profits of the firm.

Four "Export Managers" of the former firm, T. Wei'ling, Budelmann, James W. Smith and Kirkpatrick,
2153 each claimed to be entitled pursuant to their contracts of employment by the firm, to ten per cent of the recovery on the claim against the Zentral Einkaufs Gesellschaft as profits of their department.

One Stewart also claimed to be entitled to 20 per cent of that recovery, as an attorney employed to prosecute a claim at one time asserted in the name of the firm *against Great Britain,* for its seizure of the cargoes the price of which cargoes was the subject of the recovery from the Zentral Einkaufs Gesellschaft, as the purchaser thereof, by the District Court suit and the compromise of that judgment.

2154 These various claims against these partnership assets —covering 85 per cent of the recovery on the Zentral Einkaufs Gesellschaft and 25 per cent of the award of the Mixed Claims Commission—were asserted in a series of suits begun by such various claimants, and involved the executor in heavy litigation, to defeat the claims so asserted against these partnership assets.

Sorenson also in 1930, in the same connection, advanced the claim that, as sole surviving member of the former firm, he was entitled to liquidate the assets of the firm, and, by steps attempted to be taken by him in that alleged capacity, he involved the executor in additional litigation. Sorenson also assumed to make federal income tax reports in the name of the firm in accordance with his own claims that these recoveries were profits of the firm, in which he was entitled to share. These reports led to the Federal income tax proceedings settled in 1934.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2155

The claims of Sorenson and Nielsen's Executor to these recoveries, and Sorenson's claim to be entitled as surviving partner to liquidate the affairs of Crossman & Sielcken, were all asserted in one action and were all finally determined invalid, after a long trial, by a judgment of the Supreme Court for New York County entered on November 11th, 1933, in the action brought by the Chase National Bank as Ancillary Executor of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, Clara Sielcken-Schwarz and this executor (and others who were 2156 never served in the action or appeared therein).

The balance of the fund in the Three Name Account was thereupon transferred to the executor. In the interim some payments had been made out of the "Three Name Account" by the Executor (with the co-operation of Sorenson and Nielsen or his executor) on account of expenses incurred in the recovery by the firm of the claims against Wille and the Zentral Einkaufs Gesellschaft.

The claims of Stewart, and those of three of the four Export Managers on the fund, all asserted in independent suits brought by them respectively, were long since released, on settlements made with them by Mrs. Sielcken 2157 Schwarz, by payments to them by her aggregating $40,000. The claim of the fourth Export Manager (Weitling) went to trial and was dismissed and the present condition of that claim is shown in Schedule D above.

Additional litigation growing indirectly out of the 1930-1931 recoveries has been an action against one Rosenblum to vacate a judgment held to have been continuously obtained by him against said Sorenson *as surviving partner of Crossman & Sielcken,* which was accordingly vacated; and the pending action of Mildred Elfenbein as surviving partner of Maurice J. Elfenbein & Co. on substantially the same claim as that asserted by Rosenblum for $8,735 and interest, for services as accountants (actually employed by said Sorenson in 1930). She claims to be entitled to look to this estate for compensation therefor, which this executor

2158 *Exhibit A Annexed to Answering Affidavit of Belden Bacon*

disputes. That action is still pending as mentioned in Schedule D-3 hereof, subdivision (b).

A further important piece of litigation growing out of these recoveries was the claim of the United States Revenue authorities to impose an *income* tax on all these recoveries, amounting (with interest) to upwards of $180,000. This claim was finally compromised, on July 12th, 1924, after argument before the United States Board of Tax Appeals, by a stipulated award by that
2159 Board of $22,192.65, which was paid on July 12th, 1934, as shown in Schedule C of this account.

Heavy expenses were incurred in connection with these partnership recoveries both for the proceedings in which they were recovered in the United States District Court and before the Mixed Claims Commission, (which expenses were assumed by said Clara Sielcken Schwarz and have been paid to or for her out of said recoveries, as shown in Schedule F) and also for the expenses of defending such partnership recoveries against the claims of the estate of Nielsen, of Sorenson, of Stewart, of Weitling, of Budelman, of James W. Smith
2160 and of Kirkpatrick, and also in final settlement of the claims of said Stewart, said Budelman, said Kirkpatrick and said James W. Smith and in contesting these various claims and those of Rosenblum, Elfenbein and those of the United States Government for income taxes on such recoveries.

Part of those disbursements have been paid by Mrs. Sielcken Schwarz and so far as repaid to or for her out of the estate, are reported in this account in Schedule F as distributions to her as residuary legatee out of the estate. In addition, as this Executor is informed and believes, Mrs. Sielcken Schwarz has incurred some additional expenses in defending the Four Managers' suits since January 27, 1933, the amount of which expense is unknown to this Executor.

The items so paid her out of the estate for such expenses are set forth in Schedule F hereof, and include, as this Executor is informed and believes the following items there shown:

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2161

1930		
May 21	$ 61,657.94	
June 19	100,000.00	
June 27	364.50	
June 28	60.00	
Aug. 13	8.80	
Nov. 5	56,000.00	
Nov. 5	2,000.00	
Nov. 5	4,000.00	
Nov. 5	2,000.00	
Nov. 11	30,000.00	2162
Nov. 14	2.00	
1931		
Feb. 5	1,027.58	
Feb. 16	228.75	
Mar. 14	650.00	
Mar. 31	10,000.00	
Apr. 4	12,500.00	
Apr. 9	316.00	
Apr. 28	39,999.20	
May 2	821.26	
May 23	657.25	2163
June 22	162.50	
July 9	481.40	
July 24	495.75	
1932		
Jan. 8	30,279.47	
Jan. 8	3,000.00	
1933		
Apr. 27	10,000.00	
June 9	543.00	
Aug. 11	2,500.00	
Sept. 12	10,000.00	
Sept. 12	10,000.00	
Sept. 12	10,000.00	
Sept. 28	2,500.00	
Aggregating	$400,255.35	

2164 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

In addition to these disbursements by Mrs. Sielcken in these proceedings on firm account, the Executor has itself spent over $69,000 in making defense against the various actions above-mentioned based on the claims against these new firm assets, as partnership assets.

The proportionate part of these $469,000 disbursements for firm account, for the recovery and the protection of the firm assets, attributable to principal is something in excess of $290,000.

2165

The amount of principal as of the date of Sielcken's death so recovered on these new claims is, in round numbers,	$600,000.00
A similar proportion of the firm expenses in connection therewith is	$290,000.00
leaving	$310,000.00
From this should be deducted the amount of the excess of the original valuation of this asset above what was realized therefrom up to 1930	$239,825.26
2166 leaving	$ 70,174.74
Should the "Black Tom" claims be finally rejected, the further amount collectible on the unpaid *principal* of the award (taken as of Sielcken's death), would increase the recovery by only about	6,550.00
or a total of	$76,724.74

(Vide letter from the Treasury Department set forth in Schedule A-1.)

This executor is also advised and believes that, before any additional tax can be computed because of this increment, allowance must further be made for the additional unexpected expense to which the estate proper has been subjected owing to litigation over other than firm matters, begun since the summer of 1930 against the Executor, for which no allowance was made in the

original assessment. Such expenses have amounted to more than $230,000.

There is also the matter of further commissions to the executor on the 1930-1931 recoveries, computed in Schedule J hereof at $19,026.91.

Sixty per cent of these two items (being something less than the proportion of principal of the estate involved) amounts to over $150,000, as against the remaining amount of additional principal recovered by the estate ($76,724.74) on this asset above the valuation 2168
originally placed thereon.

Recomputation of the tax would, accordingly, result in no increase above the amount already assessed and paid.

If any additional tax could be assessed it would be against the interest of Mrs. Sielcken Schwarz at the rate of 4% on the increased amount of such assessment.

Moreover, this executor is advised and believes that the State is concluded by the valuation of this asset made by the orders of 1919 and 1923, fixing the value of this asset and imposing tax thereon, and can no more ask for revaluation of this separately valued asset, of 2169
the interest of the estate in the firm, because something more is finally realized therefrom than was originally estimated, than could this executor have reopened the assessment in 1926 because the amount realized from that asset was $239,825.26 less than it had been assessed at by the decrees of 1919 and 1923.

The Executor, therefore, will dispute any claim for any additional assessment of transfer tax on this estate, on account of these recoveries.

2170 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Schedule I.

EXHIBIT 1.

BARNES, AVERY & WHITING
100 Broadway,
New York

2171 BRAINARD AVERY
EARL B. BARNES
JAY E. WHITING
GEO. O. CASTELL

March 27, 1930.

Arthur Garfield Hays, Esq.,
43 Exchange Place,
New York City.

Dear Sir:

2172 *Claims of U. S. A. on behalf of Crossman & Sielcken in Liquidation and Irving Trust Company against Germany and Z. E. G.*

Z. E. G. against Executors of Hermann Sielcken deceased, and Clara Sielcken Schwarz as residuary legatee of estate of Hermann Sielcken.

Theodor Wille against Crossman & Sielcken in Liquidation, and Clara Sielcken Schwarz.

Referring to our recent conversation with respect to the settlement of the above mentioned claims, we confirm to you that the following is our understanding of the terms of settlement upon which we have agreed.

1. The money and bonds received by Crossman & Sielcken in Liquidation from the Alien Property Custodian and/or Treasurer of the United States, in payment of the decree for $716,160.37 of the United States

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2173

District Court for the southern district of New York, dated December 30, 1929, are to be forthwith deposited in a bank in this city, to be selected by you and ourselves, in the joint names of Brainard Avery and Arthur Garfield Hayes and to remain there pending consummation of the settlement herein described.

We are informed by the Alien Property Custodian that the fund to the credit of this trustee amounted, on March 22, 1930, to the sum of $786,056.86, made up as follows: 2174

Government bonds	$475,200.00
Cash	133,279.83
Income interest	177,577.03
Total	$786,056.86

We are further informed that there are no claims filed against the fund except the claim represented by said decree and one claim for $200.

2. The claim of Z. E. G. against the executors of Hermann Sielcken deceased and Clara Sielcken Schwarz as residuary legatee of his estate, arising out of the indemnity agreement dated August 31, 1918, is to be settled by payment to you, as attorney for Z. E. G., of one-half of the moneys and/or bonds received from the Alien Property Custodian and/or Treasurer of the United States, in payment of the principal of said decree with interest thereon accumulated from December 30, 1929 to the date of payment, together with one-half of any interest that may accumulate or be paid thereon during the time said bonds and/or moneys are on deposit in said bank in the joint names of Brainard Avery and Arthur Garfield Hays as hereinbefore provided. 2175

3. You are to produce and deliver to us four general releases duly executed by Z. E. G. and running to the following persons:

(a) To Estate of George Georgius, Estate of Gustav Diederichsen, Carl Isenberg and Richard Isenberg, as ex-

2176 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

ecutors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

(b) To Clara Sielcken Schwarz as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(c) To Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(d) To John S. Sorenson, as surviving and liquidating
2177 partner of the firm of Crossman & Sielcken.

4. We are to procure and deliver to you the following releases, duly executed by the parties signing the same and running to Z. E. G.:

(a) A general release from Clara Sielcken Schwarz as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(b) A general release from Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

2178 (c) A general release from John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken.

(d) A general release from Carl Isenberg and Richard Isenberg as executors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

5. The claim of Theodor Wille against Crossman & Sielcken in Liquidation and against Clara Sielcken Schwarz is to be settled by payment to you or your nominee for account of Theodor Wille, of the sum $50,000 in cash for our clients share of the moneys and/or bonds received from the Alien Property Custodian and/or Treasurer of the United States, in payment of the decree dated December 30, 1929, hereinbefore referred to.

6. In connection with the settlement of the Wille claim, you are to procure and deliver to us four general releases

 2179

duly executed by the firm of Theodor Wille and running to the following persons:

(a) To Estate of George Georgius, Estate of Gustav Diederichsen, Carl Isenberg and Richard Isenberg, as executors under the codicil of the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

(b) To Clara Sielcken Schwarz, individually and as sole beneficiary of the residuary estate of Hermann Sielcken, deceased. 2180

(c) To Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(d) To John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken.

7. In connection with the settlement of the Wille claim, we are to procure and deliver to you the following releases, duly executed by the parties signing the same, and running to Theodor Wille:

(a) A general release from Clara Sielcken Schwarz, individually and as sole beneficiary of the residuary estate of Hermann Sielcken, deceased. 2181

(b) A general release from Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken, deceased. Said release shall also specifically release Theodor Wille of and from any and all claims of the Columbia Trust Company (now Irving Trust Company) more particularly set forth in the memorial or memorials for claim now pending before the Mixed Claims Commission, List No. 207, Docket No. 8304.

(c) A general release from John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken. Said release shall also specifically release Theodor Wille of and from any and all claims of John S. Sorenson more particularly set forth in the memorial

2182 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

or memorials for claim now pending before the Mixed Claims Commission, List No. 6207, Docket No. 8304.

(d) A general release from Carl Isenberg and Richard Isenberg as executors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

8. The payments to be made, and the exchange of releases hereinbefore provided for are conditioned upon
2183 an award being entered in favor of the United States of America on behalf of Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen as surviving partners of Crossman & Sielcken, against Germany and the firm of Theodor Wille, for the sum of $558,827, with interest thereon at the rate of 5% from the 1st day of April, 1918, to the date of payment, in the proceedings now pending before the Mixed Claims Commission United States and Germany, contained in List No. 6207, Docket No. 8304.

2184 If the foregoing is in accord with your understanding of the terms of settlement above described, kindly indicate the same.

Very truly yours,

(Signed) EARL B. BARNES
BRAINARD AVERY

The foregoing is in accord with my understanding of the terms of settlement hereinabove described.

ARTHUR GARFIELD HAYS
Zentral Einkaufsgesellschaft
By Arthur Garfield Hays,
Atty. in fact.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2185

New York, 100 Broadway,
March 27, 1930.

To Messrs. Brainard Avery and Earl B. Barnes.

You are hereby authorized and directed to sign and deliver the foregoing letter.

APPROVED

IRVING TRUST COMPANY,
By ORRIN R. JUDD,
Vice President

CLARA SIELCKEN SCHWARZ
By Alex Wendroth Sielcken
Atty. in Fact. 2186

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

2187

Schedule J.

COMPUTATION OF EXECUTOR'S COMMISSIONS.

Items on which Commissions Computed

Receipts

Schedule A

Schedule A	$ 60,747.52	
Less items on which commissions already awarded	60,743.02	4.50
Schedule A-1	*1,321,885.58*	
Less *Schedule B-1*	*392,382.43*	929,503.15
Schedule A-2		22,056.66
Total		$951,564.31

2188 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Disbursements

Schedule C	$ 229,867.35	
Less items on which commissions already awarded $32.80, $17,967 and $759.15 and $8.00	18,766.95	$211,100.40
2189 *Schedule F*	$ 782,004.39	
Less items on which commission already awarded, $1,976.87, $39,999.20	41,976.07	740,028.32
		$951,128.72

Leaving in the hands of the Executor Cash $435.59.

Uncollected Amount shown in Schedule
2190 B-1 and the refunding bonds shown in Schedule A-3.

On the above items of receipts and disbursements commissions are calculated as follows:

On Receipts	
On $951,564.31 at 1%	$ 9,515.64
On Disbursements	
On $951,128.72 at 1%	9,511.28
	$19,026.92

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2191

Schedule K.

OTHER FACTS AFFECTING THE ADMINISTRATION OF THE SAID ESTATE.

By the judgment in the Supreme Court action of The Chase National Bank vs. Sorenson *et al*, entered November 11, 1933, in the Supreme Court for New York County, it was determined that the executor of Hermann Sielcken had the right and duty of liquidating the affairs of 2192
the copartnership of Crossman & Sielcken.

By the same judgment, the Irving Trust Company as such executor was required to render an account of its liquidation of the partnership since the accounting as of February 28, 1919, approved by the decree of this court of July 7, 1921. In the account so required by the Supreme Court, the executor embodied its accountings rendered before this court, approved by its decree of July 11, 1922 and by its decree of February 9, 1925, and the voluntary extra judicial accounting of this executor to the residuary legatee as of March 18, 1927, of which extra judicial account a copy is hereto annexed, marked 2193
Exhibit A and hereby made a part of this schedule.

That accounting before the Supreme Court showed that the executor as liquidator of the partnership had turned over to itself as executor of the estate the sums of $300,357.72
in cash and 230,000.00
in 3½% Treasury Notes of the United States and authorized it to turn over to itself as executor the further sum of 110,098.06
and the uncollected balance of the award of the Mixed Claims Commission, shown in Schedules A-1 and B-1.

Owing to the need of ascertaining the Executor's commissions and whether the estate is subject to further transfer tax on account of the recoveries of 1930 and 1931, the relevant items of that account have been in-

2194 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

cluded in the schedules on this accounting, being all the items including the starred items in Schedule A-1 and in Schedule A-2 of this account, with which the Executor here charges itself, and as against these $334,360.27 of the uncollected balance of the award set forth in Schedule B-1 and the two starred items in Schedule C, of $9,695.31 and .02, and the starred items in Schedule F, amounting to *$292,872.71*, all of which appeared in said partnership accounting.

2195 Deducting the one set of figures from the other the result shown by these items is that this Executor here charges itself, net, with the exact sums shown as turned over to the Executor in the partnership accounting, to wit, the $300,357.72 in cash, the $230,000.00 in Treasury Notes, the $110,098.06, and the unpaid balance of the award.

In addition to all the litigation arising out of the firm collections of 1930 and 1931, as claims against the firm assets, and the claims of Rosenblum and Elfenbein, and
2196 of the United States for income taxes, all of which are referred to in Schedule I hereof, this executor has been subjected to three proceedings instituted by the residuary legatee and by her son Alexander Wendroth Sielcken.

The suit attempted to be instituted by said Alexander W. Sielcken was in the Chancery Court of New Jersey, and in that suit it was held that the Irving Trust Company in its capacity as executor of Hermann Sielcken was not subject to the jurisdiction of the New Jersey courts and the service made on the executor of process in that suit was accordingly vacated and set aside. The executor was represented in that proceeding by Mr. Vanderbilt of Newark, New Jersey, and it is for those services in vacating and setting aside the service there made that Mr. Vanderbilt was paid the amount shown in Schedule C.

The residuary legatee, Mrs. Clara Sielcken Schwarz, in 1932, instituted an action in the Court of Common Pleas

Exhibit A Annexed to Answering Affidavit of Selden Bacon

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for Lucas County, Ohio (Toledo) against the Woolson Spice Company and certain of its officers and stockholders and the executors of a deceased stockholder, and this executor, asserting fraud in the sale of the shares of the Woolson Spice stock by this executor in 1918, which sale had been confirmed by the decree of this court of July 7, 1921.

This executor claimed that it was not subject to the jurisdiction of the Ohio Courts as executor and moved to vacate the service of the summons on it in that case, 2198
which motion was denied. The executor thereupon answered at length, denying all allegations of fraud and negligence on its part and asserting the confirmation of that sale by the decree of this Court of July 7, 1921.

In that case most elaborate proofs have been taken, first by the plaintiff in Ohio, by way of examination before trial of the other defendants, wherein approximately 600 pages of testimony were taken, of which this executor needed copies, and over 3000 pages were taken by the defendants in that action by way of depositions in New York, in the taking of which depositions this executor took part.

2199

That action is now apparently about to be abandoned. By her petition in that action the residuary legatee claimed to have been damaged in very large sums, running, as her counsel claimed, to fully $4,000,000.

In addition, in April, 1932, the residuary legatee instituted a proceeding in this court to vacate the decree of this court of July 7, 1921.

In late November 1933 she asked leave to amend and supplement this petition, which leave was granted on terms, and by her amended petition she sought to vacate and set aside the decrees of this court of July 7, 1921, July 11, 1922 and February 9, 1925, approving the first three accountings of this executor.

In that proceeding, she asserted a very large number of claims of fraud on the part of the executor, which were tried at great length before Referees Lewis and Seligsberg, appointed to take testimony and report to

this Court, Mr. Seligsberg having been appointed in place of Mr. Lewis who died while the proceeding was pending.

The Referee reported in favor of opening such decrees to a certain extent, but on a hearing before this Court in December 1936 the petition was dismissed on its merits by this court, by decree of May 15, 1937. An appeal taken from that decree by Mrs. Sielcken Schwarz has been dismissed.

2201 By that proceeding, the residuary legatee sought to surcharge this executor with sums aggregating about $4,000,000 in addition to the sums claimed by her in the said Toledo action.

In all this litigation since early November 1931, this executor was primarily represented by Mr. Selden Bacon of the firm of Duer, Strong & Whitehead and in a supervisory capacity by Mr. Leonard B. Smith, who had been counsel for the executor since 1919, and for the purposes of the final argument before this Court by Hon. Nathan L. Miller of New York; and it was also represented in the Toledo suit by local counsel in Toledo, Ohio, Messrs. Williams, Eversman & Morgan. The payments to these
2202 attorneys and the amount of their unpaid claims appear in Schedules C and D-1 of this Account.

All this litigation has so far been conducted by this executor with success in all the matters involved, the one recovery against the executor in all the litigation being the award of $22,192.65 for Federal Income taxes, as against $182,000 claimed by the Government.

The preparation of the present account has been a matter requiring the attention of counsel owing to the complexities arising from the separate accountings heretofore rendered of the estate and of the firm and the necessity of showing the lack of basis for any further estate tax by the State of New York on account of the firm recoveries of 1930 and 1931.

None of the personal property of the decedent now being accounted for or listed as an asset of the estate was, at the date of decedent's death, pledged as collateral

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2203

to any unpaid obligation of the decedent, save only as claims against the partnership were collectible primarily out of the partnership assets.

The decedent left no real property in the United States, but died seized, as this executor is informed and believes, of landed estate in or near the city of Baden-Baden in Germany known as Mariahalden. Such real estate, in Germany did not come to or under the jurisdiction of this executor in any way. This executor is informed and believes that said Mariahalden was not subject to any liens or mortgages at the time of the testator's death and that at that time its value was $362,413.34. 2204

With regard to the claims against Great Britain referred to in Subdivision 1 of Schedule 6 of Exhibit 1 of this Schedule K; these claims were on account of the same cargoes for which recovery was subsequently had from the Zentral Einkaufs Gesellschaft, in 1930, as set forth in Schedule A-1 and I. No recovery was ever obtained against Great Britain nor could be, after that recovery from the Zentral Einkaufs Gesellschaft, and the claims against Great Britain were abandoned as unsustainable.

2205

Schedule K.

EXHIBIT 1.

ACCOUNT.

American Exchange Irving Trust Company (formerly successively named Columbia-Knickerbocker Trust Company, Columbia Trust Company, Irving Bank-Columbia Trust Company, and Irving Bank and Trust Company), as Executor of the last Will and Testament of Hermann Sielcken, deceased, renders the following account of its proceedings as such Executor since the 14th day of January, 1925.

2206 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

On the 26th day of January, 1918, Letters Testamentary on said Will were duly issued to this accountant out of the Surrogate's Court of the County of New York.

On the 24th day of June, 1919, the Executor filed in the Surrogate's Court of the County of New York, an account extending from the date of its appointment to the 28th day of February, 1919. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated July 7th, 1921, and filed in the office of the
2207 Clerk of said Court on the 8th day of July, 1921.

On the 28th day of March, 1922, the Executor filed in said Surrogate's Court a second account extending from the 28th day of February, 1919, the date of its previous accounting, to and including the 31st day of December, 1921. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated July 11th, 1922, and filed in the office of the Clerk of said Court on the 13th day of July, 1922.

On the 30th day of January, 1925, the Executor filed in said Surrogate's Court a third account extending from the 31st day of December, 1921, the date of its last previ-
2208 ous accounting, to and including the 14th day of January, 1925. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated and filed in the office of the Clerk of said Court on February 9th, 1925.

SCHEDULE 1, hereto annexed, contains a statement of all the property and assets constituting the estate of said decedent on the 14th day of January, 1925, the date of the last accounting.

SCHEDULE 2, hereto annexed, contains a statement of all cash received by the Executor from the disposition of the assets, and all other sources, from January 14th, 1925, to the date of this accounting.

SCHEDULE 3, hereto annexed, contains a statement of all cash paid for expenses of administration since January 14th, 1925, the date of the last accounting.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2209

SCHEDULE 4, hereto annexed, contains a statement of all property transferred, and payments made, to legatees under the Will.

SCHEDULE 5, hereto annexed, contains a statement of the items constituting the assets of the estate on the date of this accounting.

SCHEDULE 6, hereto annexed, contains a statement of all other facts affecting the administration of the estate, the rights of the Executor and those of others interested therein.

2210

SUMMARY STATEMENT.

The Executor charges itself as follows:		
With amount of Schedule 1		$304,753.67
With amount of Schedule 2		138,411.76
		$443,165.43
The Executor credits itself as follows:		
With amount of Schedule 3	$ 1,270.12	
With amount of Schedule 4	409,918.44	441,188.56
Leaving a balance of		$ 1,976.87

2211

to be paid over to the residuary legatee, Clara Sielcken Schwarz.

The said schedules, which are severally signed by the Executor, are hereby made part of this account.

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY, Executor,
By H. MAJOR,
Assistant Secretary.

2212 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"Schedule 1."

Contains a statement of all the property and assets constituting the estate of the decedent on the 14th day of January, 1925, the date of the last accounting.

Warburg & Goldschmidt, balance due on settlement	$ 850.00
$100,000 N. Y. City 3 1/2 Cap. Stock due 1940 at 78 1/8 net	78,125.00
2213 $25,000 State of Illinois 4 1/4% due 1938 at 101.8339	25,459.73
$25,000 State of Minnesota 4s 1943 at 99 net	24,750.00
$15,000 City of San Francisco 4 1/2s due 1943 at 101.1972	15,179.58
$15,000 State of Kansas 4 1/2s due 1939 at 104.1436	15,621.54
$15,000 City of Milwaukee School 4 1/2s due 1931 at 102.1845 net	15,327.68
$10,000 City of Minneapolis 4 1/2s due 1936 at 102.9020	10,290.21
$25,000 City of Cincinnati, 4 1/2s due 1936	
2214 at 103.2642	25,816.05
Accrued interest paid on purchase of above bonds and not received prior to date of last accounting	223.89
Cash	93,109.99
	$304,753.67

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY, Executor,
By H. MAJOR,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2215

"Schedule 2."

Contains a statement of all cash received by the Executor from the disposition of the assets, and all other sources, from January 14th, 1925, to the date of this accounting.

1925				
Jan. 22	Received interest on deposits, Crossman and Sielcken, in liquidation		$ 4.74	2216
Jan. 24	Received from Treas. Dept. U. S. for refund of Federal Estate Tax	$113,294.34		
	Int. on $94,423.03 refund from 2/26/21 to 12/20/24	19,331.72		
	Int. on 2,105.28 from 6/10/21 to 12/20/24	445.74		
	Int. on 26,766.03 from 1/11/22 to 12/20/24	4,725.49		
	Total		137,797.29	2217
Mar. 2	Received interest on deposits, Crossman and Sielcken, in liquidation		3.07	
May 28	Interest on deposits		462.20	
Nov. 28	Interest on deposits		51.52	
1926				
May 28	Interest on deposits		43.74	
Nov. 29	Interest on deposits		30.91	
1927				
Mar. 18	Interest on deposits		18.29	
	Total		$138,411.76	

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY, Executor,
By H. MAJOR,
Assistant Secretary.

2218 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"Schedule 3."

Contains a statement of all cash paid for expenses of administration since January 14th, 1925, the date of the last accounting.

1925				
Jan.	14	Paid Pioneer Warehouse Co., storage of books and papers		$ 35.83
Feb.	5	Paid additional Federal Income Tax on amended Return for the year 1922, $2518.23, with interest as follows:		
2219		1st quarterly payment due 3/15/23....	$629.56	
		Int. at 6% from 3/15/23—2/5/25....	71.61	
		2nd quarterly payment due 6/15/23....	629.56	
		Int. at 6% from 6/15/23—2/5/25....	62.09	
		3rd quarterly payment due 9/15/23....	629.56	
		Int. at 6% from 9/15/23—2/5/25....	52.57	
		4th quarterly payment due 12/15/23..	629.55	
		Int. at 6% from 12/15/23—2/5/25....	43.15	
				$ 2,747.65
Feb.	14	Paid Irving Bank-Columbia Trust Company,		
2220		Executor's commissions pursuant to decree of the Surrogate's Court dated February 9th, 1925, settling the Executor's account to January 14th, 1925		24,835.23
Feb.	25	Paid Pioneer Storage Warehouse Co., storage of books and papers		35.83
Mar.	16	Paid Collector of Internal Revenue, Second District of New York, First Quarterly payment of 1924 Income Tax		55.63
Apr.	14	Paid State Tax Commission, New York State Income Tax for 1924		62.66
June	12	Paid Colelctor of Internal Revenue, Second Distriet of New York, balance of 1924 Income Tax		166.88
1926				
Mar.	5	Paid Irving Bank-Columbia Trust Company, Executor's commissions for the year 1925, 2% on $25,019.74		500.39
Mar.	15	Paid Collector of Internal Revenue, Second District of New York, Federal Income Tax for the year 1925, in full		1,092.22

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2221

Apr. 2	Paid State Tax Commission, additional tax on 1922 Income, as per Notice of Assessment		263.55
Apr. 14	Paid State Tax Commission, New York State Income Tax for the year 1925		240.75
Aug. 21	Paid Hans. H. A. Meyn, for legal services, opinion and affidavit as to German law		150.00
1927 Jan. 22	Paid Leonard B. Smith for disbursements as follows:		
	Cost of Printing Brief on application for Certiorari to the U. S. Supreme Court	$ 53.40	2222
	Judgment for Printing in Court of Claims	9.70	
		$ 63.10	
	Less amount paid by McMaster & Thurber	31.55	31.55
1927 Jan. 25	Paid Leonard B. Smith, Docket fee in the U. S. Supreme Court	$ 25.00	
	Additional Deposit	75.00	2223
		$100.00	
	½ paid by Mr. McMaster	50.00	50.00
Mar. 18.	Paid American Exchange Irving Trust Company, commissions as Executor from January 1st, 1926, to date		1.95
Mar. 18	Paid Leonard B. Smith, legal services and disbursements in the administration of the estate from January 14th, 1925, to date		1,000.00
	Total		$31,270.12

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY,
Executor,

By H. MAJOR,
Assistant Secretary.

2224 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"Schedule 4."

Contains a statement of all property transferred, and payments made, to legatees under the Will.

1925			
Jan. 21	Paid to Clara Sielcken Schwarz, on account of her residuary legacy		$ 50,000.00
Feb. 20	Paid to Clara Sielcken Schwarz, on account of her residuary legacy, balance of the cash payment directed by decree of the Surrogate's Court on February 9th, 1925, as follows:		
2225	Amount of payment directed by the decree	$68,274.76	
	Less payment on account on January 21, 1925	50,000.00	18,274.76
Feb. 20	Assigned to Clara Sielcken Schwarz, uncollected demand against Warburg & Goldschmidt, pursuant to decree of the Surrogate's Court dated February 9th, 1925		850.00
2226 Feb. 20	Transferred to Clara Sielcken Schwarz, the following securities pursuant to the decree of the Surrogate's Court of February 9th, 1925, at the following valuations fixed in said decree:		
	$100,000 N. Y. City 3½ Capital Stock due 1940 at 78⅛ net		78,125.00
	$25,000 State of Illinois 4½% due 1938 at 101.8339		25,459.73
	$25,000 State of Minnesota 4s 1943 at 99 net		24,750.00
	$15,000 City of San Francisco 4½s due 1943 at 101.1972		15,179.58
	$15,000 State of Kansas 4½s due 1939 at 104.1436		15,621.54
	$15,000 City of Milwaukee School 4½s due 1931 at 102.1845 net		15,327.68

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2227

	$10,000 City of Minneapolis 4½s due 1936 at 102.9020	10,290.21
	$25,000 City of Cincinnati 4½s due 1936 at 103.2642	25,816.05
	Accrued interest paid on purchase of above bonds and not received prior to date of last accounting	223.89
Feb. 20	Paid to Clara Sielcken Schwarz, on account of her residuary legacy	130,000.00
	Total	$409,918.44

2228

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY,
Executor,
By H. MAJOR,
Assistant Secretary.

"Schedule 5."

2229

Contains a statement of the items constituting the assets of the estate on the date of this accounting.

1927			
Mar. 18	Cash in hands of Executor	$	1,976.87

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY,
Executor,
By H. MAJOR,
Assistant Secretary.

2230 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"Schedule 6."

Contains a statement of all other facts affecting the administration of said estate, the rights of the Executor and those of others interested therein.

1. In addition to the assets set forth in this account and previous accounts, the Estate of said decedent has a possibility of recovering from Great Britain, through diplomatic channels or otherwise, the proceeds of certain
2231 cargoes of merchandise in which the decedent had an interest, which cargoes were seized by the British Navy, condemned by a British Prize Court, and sold during the European War. The Executor assigned these claims to the residuary legatee, Mrs. Clara Sielcken Schwarz, by assignment executed and delivered 1925. The Executor had employed as attorney for the prosecution of these claims, Frank H. Stewart, Esq., of #6 Beacon Street, Boston, Massachusetts. The Executor had made a contract with Mr. Stewart for the prosecution of the claims upon a contingent fee; all the papers in connection with said claims were in the possession of Mr. Stewart.

2232

2. On January 24th, 1925, the Executor received from the Treasury Department, a refund on account of the Estate Tax of $113,294.34, with interest thereon amounting to $24,502.95, total $137,797.29, as set forth in "Schedule 2" hereof. The said refund was made up of three classes of items, viz:

(1) Administration expenses incurred by the Executor subsequent to October 30th, 1920, the date of the assessment of the Estate Tax, for which expenses no allowance was made in said assessment.

(2) Claims against the Estate paid by the Executor subsequent to October 30th, 1920.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2233

(3) Losses sustained in liquidating doubtful assets of the Estate, for which losses no allowance had been made in the assessment.

Many of the items in class (1) (Administration Expenses), had already been claimed as deductions from income, for the purpose of the Federal Income Tax during the years in which they were respectively incurred, and it was required by the Government as a condition of the readjustment of the Estate Tax, that Amended Income Tax Returns should be filed for the 2234
years 1921 and 1922, eliminating these deductions. Such Amended Returns were accordingly filed, resulting in an additional tax for 1922, amounting with interest, to $2,747.65, which the Executor paid on February 5th, 1925, as shown in "Schedule 3" hereof.

3. On March 31, 1925, the Executor made a motion in the Surrogate's Court, to modify the orders assessing the Transfer Tax upon the Estate, and thus to recover about $18,000 in taxes, on the ground that the amount of the Federal Estate Tax should have been deducted from the gross estate for the purpose of assessing the Transfer Tax. This motion was made in 2235
order to arrest the running of the statutory limitation of time for such a motion. It was held in abeyance until the decision on April 14th, 1925, of the case of Stebbins vs. Riley by the United States Supreme Court, which decision destroyed the basis for the Executor's claim, and the motion was thereupon withdrawn.

4. About January 28th, 1925, the Executor filed a claim for refund of Federal Estate Tax amounting to about $51,000 and interest, upon the ground that under the provisions of the Revenue Act of 1916, the Federal Estate Tax itself should have been deducted from the gross estate in computing the net estate subject to tax. This claim was rejected, and the Executor thereupon brought an action upon it in the Court of Claims of the United States. This action was argued and ex-

2236 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

tensive briefs were submitted by both sides, and the action was decided by the Court of Claims against the Estate, on November 8th, 1926. The Executor then made an application to the Supreme Court of the United States, for a writ of certiorari to review the decision, but this application was denied, and the action was thus finally terminated. However, a number of actions in other estates are now pending in the United States Courts in several different Circuits, and each
2237 of these actions will be appealed to the Circuit Court of Appeals. In case one of the Circuit Court of Appeals should decide in favor of the Estate, a conflict of decisions would be presented, which the United States Supreme Court would undoubtedly review by a writ of certiorari, and thus the legal question at issue might ultimately be decided against the government. Counsel for the Executor are trying to arrange matters with the Treasury Department, by stipulation or otherwise, in such a way that in the event of the ultimate determination of the question of law against the government, the Estate may obtain the benefit of such decision and receive the refund, notwithstanding the adverse termina-
2238 tion of the Executor's own action. This possibility of ultimate recovery of the aforesaid refund is the only outstanding claim existing in favor of the Estate against anyone, to the knowledge of the Executor.

5. During the period covered by the account, several questions arose in regard to the payment of additional State and Federal Income Taxes, which payments appear in the account, but it is believed that these matters have all been now finally settled. The reopening of the Federal Income Tax Returns for 1920 and previous years, is now barred by lapse of time, and the subsequent Returns have been amended, so that it is believed there is no prospect of any further claim by the government. The Executor did not enter into any agreement with the Treasury Department fixing the

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2239

amount of the Income Taxes, as the Executor was advised by counsel that this was inadvisable.

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY,
Executor,
By H. Major,
Assistant Secretary.

State of New York,
County of New York, ss: 2240

Henry Major, being duly sworn, says:

I am an officer, to wit: Assistant Secretary of American Exchange Irving Trust Company, the Executor of the last Will and Testament of Hermann Sielcken, deceased, and as such officer of and in behalf of the said Executor I have had charge and management of the administration of the estate of said decedent and am familiar with all the facts and circumstances involved in said administration. The charges made in the foregoing account of proceedings and schedules annexed, for moneys paid by said Executors to creditors, legatees and for necessary expenses are correct. The Executor is charged 2241
therein with all interest for moneys received by it and embraced in said account for which it is legally accountable; the moneys stated in said account as collected were all that were collectible according to the best of its knowledge, information and belief; the allowances in said account for decrease in value of any assets and charges therein, for the increase in such value are correctly made, and I do not know of any error in said account or anything omitted therefrom which may in any wise prejudice the rights of any party interested in said estate or fund, and said account contains to the best of my knowledge and belief a full and true statement of all receipts and disbursements on account of said estate or fund and of all money and other property belonging to said estate or fund which have come into its hands or which have been received by any other person for it or by it or by order or authority for its use; and I do not know of any error or omission in

2242 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

the account to the prejudice of any creditor of or person interested in said estate or fund.

HENRY MAJOR.

Sworn to before me this
18th day of March, 1927.
G. E. Osborn,
Notary Public,
Queens County No. 1298.
Cert. filed in N. Y. Co. No. 102. Reg. No. 8084.
2243 Cert. filed in Bronx Co. No. 37, Reg. No. 8041.
Term expires March 30, 1928.
(Notarial Seal)

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

Affidavit of Accounting Party.

2244 State of New York,
County of New York, ss:

John F. McIlwain, being duly sworn, says: that he resides at Scarsdale in the County of Westchester, State of New York; that he is Assistant Secretary of the Irving Trust Company and that he has been, since May, 1933, in primary charge for it of the estate of Hermann Sielcken, deceased, of which said Irving Trust Company is and since January 26th, 1918, has been executor; that prior to May, 1933, Mr. Orin R. Judd (who is no longer connected with the Irving Trust Company), who was a vice president of said Irving Trust Company had primary charge of said estate for said Trust Company from 1925 until May, 1933, when deponent succeeded him; and deponent has familiarized himself with the details of such administration since March 18th, 1927, the date of the last prior accounting of such estate up to the time in May, 1933, when he

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2245

was placed in primary charge thereof that the foregoing schedule of assets of the estate reported by this executor are true and complete and include all money and property of any kind, and all increment thereon, which has come into the Executor's hands or has been received on its account by any other person, and include all indebtedness due by said deceased, whether discharged by his will or not, save only items discharged prior to March 18th, 1927, shown by said executor's prior accountings herein; that the moneys stated in

2246

said account as collected by this executor were all that could be collected; that all claims of credit for losses or decreases of value of assets are correctly reported; that the reported payments by it out of estate assets for funeral and administration expenses were actually made, and made in the amounts scheduled; that the reported payments to creditors, to legatees and to distributees were actually made at the dates and in the amounts scheduled; that no payments have been made by this executor on its own claims against the estate, except after prior approval and allowance by the Surrogate; that all receipts and disbursements are correctly and fully reported and scheduled; that affiant does not know

2247

of any error in the account or in any schedule thereof nor does he know of any matter or thing relating to the estate of deceased omitted therefrom to the prejudice of the rights of any creditor or of any person interested in the estate; and that the schedule of commissions submitted by the executor has been computed in conformity to the statute regulating commissions and the Rules of the Surrogate's Court, New York County, applicable thereto.

JOHN F. McILWAIN.

Sworn to before me this
11th day of December, 1937.
William G. Phillips,
Notary Public,
Nassau Co., N. Y., No. 992.
Certificate filed in N. Y. Co. No. 148.
N. Y. County Register's No. 8-P-92.
My Commission expires March 30, 1938.
(Seal)

2248 **Exhibit B Annexed to Answering Affidavit of Selden Bacon.**

BEFORE THE MIXED CLAIMS COMMISSION

UNITED STATES AND GERMANY

ORGANIZED UNDER THE AGREEMENT OF AUGUST 10, 1922,

BETWEEN THE UNITED STATES AND GERMANY

2249 United States of America on behalf of COLUMBIA TRUST COMPANY (now the American Exchange Irving Trust Company), as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and JOHN S. SORENSON and THORLEIF S. B. NIELSEN, surviving partners of the firm of Crossman & Sielcken, vs. GERMANY, and the firm of THEODOR WILLE, impleaded. 2250	List No. 6207 Docket No. 8304

MEMORIAL FOR CLAIM

The claimants, Columbia Trust Company (now the American Exchange Irving Trust Company), John S. Sorenson and Thorleif S. B. Nielsen, citizens of the United States, respectfully show to this Commission:

(1) That Hermann Sielcken was on all pertinent dates herein, and until the time of his death, on or about October 8, 1917, a citizen of the United States, residing in the United States, although temporarily residing in Germany at the time of his death (Exhibits 1, 2 and 3); that Clara Sielcken (now Clara Sielcken Schwarz), the widow and sole beneficiary of the residuary estate of the said Hermann Sielcken, deceased (Exhibit 4), is and was on all pertinent dates herein a citizen of the United

Exhibit B Annexed to Answering Affidavit of Selden Bacon

2251

States (Exhibits 1 and 2), residing in the United States, although in Germany at the outbreak of the War, and returned to the United States in 1919 (Exhibit 2); that John S. Sorenson and Thorleif S. B. Nielsen are citizens of the United States and, on all pertinent dates herein, resided in the United States (Exhibits 3 and 5); that the Columbia Trust Company (now the American Exchange Irving Trust Company) is and was on all pertinent dates herein a corporation duly organized and existing under the laws of the State of New York, having its principal place of business in the City of New York, State of New York (Exhibit 6, Annex A).

2252

(2) That the said Hermann Sielcken, deceased, left a Last Will and Testament wherein he named the Columbia-Knickerbocker Trust Company as Executor with respect to all property left by the said Hermann Sielcken in the United States of America, and particularly with respect to the liquidation of the firm of Crossman & Sielcken, hereinafter mentioned (Exhibit 4); that the said Columbia Trust Company is the executor named as "Columbia-Knickerbocker Trust Company" in the said Last Will and Testament (Exhibit 6, Annex A)..

2253

(3) That said Last Will and Testament of Hermann Sielcken was duly admitted to probate by the Surrogate's Court of New York County in the City of New York on or about the 25th day of January, 1918; and that the said Columbia Trust Company thereupon duly qualified and entered upon the discharge of its duties as (and now is) such executor (Exhibit 6, Annex B).

(4) That at all times hereinafter mentioned, up to October 8, 1917, said Hermann Sielcken, John S. Sorenson and Thorleif S. B. Nielsen were engaged in business as exporters, importers and commission merchants, as co-partners doing business under the firm name and style of Crossman & Sielcken, having their principal place of business in the Borough of Manhattan, City, County and State of New York; that by their agree-

2254 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

ment of co-partnership which bore date the 2nd day of June, 1913, it was provided among other things that the capital of said partnership, upon the termination of the partnership, from whatever cause, should belong to said Sielcken or to his estate, and that said Sorenson and Nielsen, respectively, should have an interest in the business, consisting of a percentage of the net profits that might be realized therefrom, and that in and by said agreement of co-partnership it was further pro-
2255 vided that upon the death of said Sielcken it should be the duty of the surviving partners to transfer and pay over to the executor of the Will of the deceased partner his capital and the property and business of the firm (Exhibit 3, Annex D).

(5) That all of the customers and business associates of the firm of Crossman & Sielcken were duly informed in 1913 of the creation of the new partnership of Crossman & Sielcken as aforesaid, in June, 1913 (Exhibit 3, Annex E).

(6) That said Hermann Sielcken, deceased, provided in his Will aforesaid that the management of the firm
2256 business for liquidation should be left in the hands of said Sorenson and Nielsen to the largest possible degree under the supervision of his executor (Exhibit 4).

(7) That pursuant to the provisions of said agreement of co-partnership and of the Will aforesaid, upon the death of said Hermann Sielcken, said surviving partners, Sorenson and Nielsen, did undertake to collect the assets and to proceed with the liquidation of the business and did transfer and pay over to said Columbia Trust Company, executor, the said capital and property of said firm then in their possession and/or under their control, and which had come into their possession or control. That said Columbia Trust Company, as executor, did engage, and its successor has ever since been, and now is, engaged in the supervision of the liquidation of the business of said partnership and by reason of the foregoing, said Sorenson, Nielsen and the Columbia

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2257

Trust Company, executor, is, and are entitled to collect and receive all of the assets and credits of said firm of Crossman & Sielcken and to procure and recover upon any and all causes of action and claims of whatever nature, existing in favor of such firm at the time of its dissolution; that the said Sorenson and Nielsen in addition are entitled to receive each for his own account, twelve and one-half per cent of the net profits realized from the business (Exhibit 3, Annex D, and Exhibit 4).

(8) That the firm of Theodor Wille is a firm which 2258
is and was on all pertinent dates herein, composed of German nationals doing business in Hamburg, Germany, being composed of Gustav Diederichsen, a German national, who died resident in Germany in 1925, and Georg Georgius, a German national, who died resident in Germany in 1923 (Exhibit 3).

(9) That for many years prior to 1917, the said firm of Crossman & Sielcken transacted business in Germany and other European countries, through the firm of Theodor Wille, as a result of which contracts and business transactions, there have existed and do exist, open running accounts in dollars (United States currency), in 2259
marks (German currency) and a securities account with Theodor Wille, which said accounts have not since been satisfied. That since the sixth day of April, 1917, no business has been transacted between the said firms, Crossman & Sielcken and Theodor Wille (Exhibits 3 and 7).

(10) That, on or about September 1, 1915, the said Hermann Sielcken, deceased, entered into an agreement with Peimann, Ziegler & Company, a firm composed of German nationals, at that time owing Crossman & Sielcken and Theodor Wille, jointly, about M. 4,500,000, on account of certain coffee transactions, wherein it was agreed that Theodor Wille and Crossman & Sielcken would together assume M. 2,500,000 of the losses of said Peimann, Ziegler & Company. Thereupon, Peimann, Ziegler & Company, under date of September 1, 1915,

2260 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

entered into an agreement with Theodor Wille and Crossman & Sielcken to pay them M. 2,000,000, together with interest at 4% from November 1, 1915, in settlement of such joint account. (Exhibit 19, Annex D and E.)

Pursuant to that agreement Peimann, Ziegler & Company paid Theodor Wille on said account, the following amounts, on the dates specified (Exhibit 19, Annex A):

1918			Marks
2261 Jan.	2	By remittance (cash)	200,000.00
June	30	" 4% interest (cash)	4,000.00
Nov.	1	" M. 200,000—Deutsche Reichsanleihe 5% (valued at 98.)	196,000.00
"	1	" remittance (cash)	4,000.00
"	1	" mortgage (valued at par)	100,000.00
		Total	504,000.00

Thereafter, on or about June 30, 1919, Theodor Wille entered into an agreement with Peimann, Ziegler & Company to accept, and did accept, in settlement of the balance of said joint account, the following securities, interest and cash:

2262

1919			Marks
June	30	By 5% Deutsche Reichsanleihe	1,500,000.00
"	"	" Interest thereon	37,500.00
"	"	" Interest on mortgage	2,250.00
"	"	" 5% Deutsche Reichsanleihe—interest	5,000.00
"	"	" 4% interest	15,774.70
		Total	1,560,524.70
		Total received by Wille from Peimann, Ziegler & Company	2,064,524.70

(See Exhibit 19, Annex A.)

Theodor Wille credited "H. Sielcken account for pending liquidation" with one-half of the above amount, to wit, M. 1,032,262.35. (Exhibit 19, Annex A.)

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(11) That in March, 1916, Theodor Wille received for the account of Crossman & Sielcken the amount of M. 3,121,282.85 from the following coffee transactions, which were credited to the Hermann Sielcken, Hamburg account (Exhibit 15):

1916		Marks	
Marz 31	Fur 1/3 Anteil an Hamburger, Bremer, Triester, Valoris Kaffee	1,225,369.67	
Marz 31	Fur Anteil an Antwerpener, Valoris Kaffee	1,495,913.18	2264
Marz 31	Fur Anteil an Kommitte Vergutung Val Kaffee	400,000.00	
		3,121,282.83	

On the same date, March 31, 1916, Theodor Wille invested the foregoing Crossman & Sielcken credits in the following securities (Exhibit 15):

Face Value		Price	
M. 2,000,000	5% Deutsche Reichsanleihe of 1916	M. 1,945,000.00	
M. 1,000,000	4½% Deutsche Reichsschatzanweisungen of 1916	M. 938,750.00	2265
	Total	M. 2,883,750.00	

(12) During the months of September and October, 1916, Crossman & Sielcken in New York transmitted to Theodor Wille by cable and/or wireless transfers the sum of M. 5,675,000 at a dollar cost of $999,453.14, which Wille received and invested in the following securities (Exhibit 15):

1916	Face Value	Securities	Price
Oct. 5—	M. 530,000	4½% German Reichsschatzenweisungen of 1916 (Fifth Issue)	M. 497,868.75

2266 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

"	6—	426,000	4½% German Reichsschatzenweisungen of 1916 (Fifth Issue)	400,227.00
"	9—	544,000	4½% German Reichsschatzenweisungen of 1916 (Fifth Issue)	511,292.00
"	2—	500,000	5% German Reichsanleihe of 1916 (Fifth Issue)	477,638.90
"	9—	560,000	5% German Reichsanleihe of 1916 (Fifth Issue)	535,500.00
2267 "	9—	575,000	5% German Reichsanleihe of 1916 (Fifth Issue)	549,843.75
"	10—	525,000	5% German Reichsanleihe of 1916 (Fifth Issue)	502,104.15
"	12—	260,000	5% German Reichsanleihe of 1916 (Fifth Issue)	248,733.35
"	16—	260,000	5% German Reichsanleihe of 1916 (Fifth Issue)	248,877.80
"	20—	525,000	5% German Reichsanleihe of 1916 (Fifth Issue)	502,833.35
"	24—	295,000	5% German Reichsanleihe of 1916 (Fifth Issue)	282,708.35
2268		M. 5,000,000	Total	M. 4,757,627.40

(13) Theodor Wille, upon the order of Clara Sielcken delivered prior to July 2, 1921, to the following persons and bank so many of the foregoing securities as equal the par value of M. 462,800, but no more (Exhibit 19):

Nov.	1917—To Robert Koch, Jeweler, Frankfort-on-Main, Germany, for debt contracted prior to Mr. Sielcken's death	M. 210,000.00
Oct.	22, 1918—To Rheinische Creditbank, Baden-Baden	200,000.00
Mar.	1919—To Collector of Taxes for property taxes for 1918	52,800.00
	Total	M. 462,800.00

Exhibit B Annexed to Answering Affidavit of Selden Bacon

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(14) That upon the death of said Hermann Sielcken, deceased, there became due and owing, arising out of said pre-war transactions, from the firm of Theodor Wille to the said Sorenson and Nielsen, surviving partners of the firm of Crossman & Sielcken, in liquidation, stated as of April 6, 1917, including appropriate debits and credits from that date to July 2, 1921, the sums of M. 8,653,283.29 and $104,048.48, as stated below:

2270

(a) Due Crossman & Sielcken from Theodor Wille (Special Account) April 6, 1917, (Ledger J, 425—K. 404) (Exhibits 3 and 7, Schedule 1) ..... M. 1,340,587.48

(b) Due Crossman & Sielcken from Theodor Wille (Peimann, Zielger & Co., Hamburg Loan A/c) April 6, 1917 (Ledger J, 163—K. 400) (Exhibits 3 and 7, Schedule 2) 242,729.08

2271

(c) Due Crossman & Sielcken from Theodor Wille on "Herr Hermann Sielcken", Hamburg Account, stated as of April 6, 1917, together with appropriate debits and credits from that date to July 2, 1921, exclusive of avails of securities subsequent to October 8, 1917 (Exhibits 3, 15, 16, 17, 18 and Annex C of Exhibit 19) 261,366.69

Total Marks due C. & S., (a), (b) and (c) above ..... M. 1,844,683.25

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(d) Due Theodor Wille from Crossman & Sielcken (12/12 Joint a/c Coffee Options in Hamburg) April 6, 1917, (Ledger J, 421—K, 402) (Exhibits 3 and 7, Schedule 3)	M. 1,316,785.26	
(e) Due Theodor Wille from Crossman & Sielcken (Hamburg Mark a/c) April 6, 1917 (Ledger J, 411—K, 399) (Exhibits 3 and 7, Schedule 4)	M. 85,454.45	
Total Marks due Theodor Wille (d and e above)		M. 1,402,239.71
Balance of marks due Crossman & Sielcken		M. 442,443.54
(f) Due Crossman & Sielcken on account settlement Peimann, Ziegler & Co., account in 1918 and 1919 (Exhibits 3 and 19, Annex A) (Paragraph 10 above)		M. 1,032,262.35
(g) Value of German securities due Crossman & Sielcken October 8, 1917:		
M. 3,000,000 securities purchased by Wille in March, 1916 (Paragraph 11 above)	M. 2,883,750.00	
M. 5,000,000 securities purchased by Wille in October, 1916 (Paragraph 12 above)	M. 4,757,627.40	
Total	M. 7,641,377.40	
Less securities listed in Paragraph 13 above	462,800.00	
Total		M. 7,178.577.40

2273

2274

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2275

Total Marks due Crossman & Sielcken		M. 8,653,283.29	
(h) Due Crossman & Sielcken from Theodor Wille (Dollar Account) on Oct. 8, 1917, plus and minus appropriate debits and credits to July 2, 1921 (Ledger J, 402—K. 390) (Exhibits 3 and 7, Schedules 5, 5-a, 5-b, 5-c)	$296,950.00		2276
(i) Due Theodor Wille from Crossman & Sielcken (Boston & New Orleans Flour a/c Oct. 8, 1917 (Ledger J, 441—K, 406) (Exhibits 3 and 7, Schedule 6)	192,901.51		
Total dollars due Crossman & Sielcken (Exhibits 3 and 7)		$104,048.49	

(15) That shortly after the death of said Hermann Sielcken, and prior to the legislation of November 10, 1917, making certain German exceptional war legislation specifically applicable to American nationals, and on or about October 11, 18, and 30, 1917, Clara Sielcken demanded of Gustav Diederichsen and Georg Georgius as members of the firm of Theodor Wille the bonds and amounts there on deposit and belonging to the estate of Hermann Sielcken and/or to Clara Sielcken and/or to Crossman & Sielcken, asking at the same time their assistance to enable her to take this property out of Germany and/or to convert the property into neutral exchange. (Exhibit 2.) 2277

(16) That the said Georg Georgius and Gustav Diederichsen as members of the firm of Theodor Wille refused to assist or enable Clara Sielcken to remove from Germany for her own account and/or for the firm of

2278 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

Crossman & Sielcken the amounts and securities there on deposit and/or to turn over to her the securities and sums which they had in their possession for the account of Crossman & Sielcken, except the securities specified in Paragraph 13 above and the sums advanced for her personal and living expenses from the Estate of Hermann Sielcken. (Exhibit 2.)

(17) That on or about October 18, 1917, a certain Will dated February 18, 1917, purporting to be the last Will
2279 of Hermann Sielcken, deceased, was duly opened before the Grand Ducal Notarial Office at Baden-Baden, Germany, and on or about November 16, 1917, Georg Georgius, Gustav Diederichsen, Carl Isenberg and Richard Isenberg were duly appointed executors thereunder. (Exhibit 6, Annex C, and Exhibit 8, Annexes A, B, and C.)

(18) That the said executors decided not to take, and did not take, over the property of Crossman & Sielcken or any property belonging to the Estate of Hermann Sielcken, deceased, or to the firm of Crossman & Sielcken. (Exhibit 6, Annex C, and Exhibit 8.)

2280 (19) That in or about the month of March, 1918, members of the firm of Theodor Wille duly prepared a report of all of the property belonging to the firm of Crossman & Sielcken and/or to Hermann Sielcken, deceased, and/or to Clara Sielcken, exclusive of the debts owing from Wille to Crossman & Sielcken, for the Treuhander fur das feindliche Vermogen, which said report Clara Sielcken signed. (Exhibit 2, Exhibit 9, page 2, and Annex I, and Exhibit 10.) That the Treuhander thereupon took under his administration the property so reported. (Exhibit 2 and Exhibit 9, pages 4 and 5, and Annex V.)

(20) That the firm of Theodor Wille made certain personal loans for account of the Estate of Hermann Sielcken, deceased, and advanced monies to Clara Sielcken for her personal and living expenses in Germany, which sums Clara Sielcken repaid from her own personal funds

2281

in 1921 after her return to the United States. (Exhibits 2 and 19, Annex C.)

(21) That in 1919, when Clara Sielcken was preparing to leave Germany, she was informed by Gustav Diederichsen that the firm of Theodor Wille was prohibited from delivering to her the bonds and monies of Crossman & Sielcken which they had on deposit, and from paying any debts due and owing to Crossman & Sielcken; and was further informed that she would be permitted to take out of Germany no more than 400 Marks; that Clara Sielcken thereupon left Germany in August, 1919, taking with her only 400 Marks, and a certain amount of jewelry. (Exhibit 2.)

2282

(22) That upon reaching Christiana, Norway, Clara Sielcken was able to, and did, obtain a loan by cable transfer from the Columbia Trust Company, by depositing her jewelry with den Norske Creditbank at Christiania, Norway, as security therefor; that as a result of this transaction, she was able to return to the United States. (Exhibits 2 and 11.)

(23) That the said firm of Theodor Wille at all times after October, 1917, refused to deliver the securities, with the exception of those specified in Paragraph 13 above, and/or to make any payments of the aforesaid accounts to Crossman & Sielcken and/or to Clara Sielcken (except the sums advanced for her personal and living expenses out of loans from Wille to the Estate of Hermann Sielcken, deceased), until the summer and fall of 1921, at which time they released and/or sold approximately 7,587,200 depreciated mark bonds, the prohibitions against their doing so being no longer effective. (Exhibits 2 and 19).

2283

(24) That the following books of original record of the firm of Crossman & Sielcken are submitted in support of this claim for examination by the Commission, the return of which is respectfully requested, when they have served their purpose:

2284 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

Private Ledgers D and E
Private Journal Brazil Business
Brazil Ledgers J and K
Export Journal G and H
Import Journal No. 4
Old Crossman & Sielcken Ledger, showing accounts prior to June 2, 1913.

That the return is also requested of the following original papers submitted as exhibits in support of this claim:

2285 Exhibit 3, Annex C—Partnership Agreement.
Exhibit 3, Annex D—Partnership Agreement.

(25) That claim herein, upon the facts hereinabove set forth and the evidence in support thereof, is as follows (Exhibits 3, 7, 15, 16, 17, 18, 19 and 20):

A.

Balance of Dollar accounts, in the amount of $104,048.49 and of current Mark accounts, in the amount of M. 442,443.54. To this said Mark account are to be added:

2286 (a) The share of Crossman & Sielcken in the settlement of the debt of Peimann, Ziegler & Company, in the amount of M. 1,032,262.35, this said company having made payment to Theodor Wille, for the value of which payment Theodor Wille thereafter became obligated to Crossman & Sielcken, and

(b) The value of the German Securities in the amount of M. 7,178,577.40, which securities Clara Sielcken demanded in October, 1917, and which securities the firm of Theodor Wille refused to deliver upon their own responsibility.

The total of said Mark amounts is M. 8,653,283.29.

B.

If the commission finds that claimants are not entitled to the market value of the German securities, as a debt

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2287

from Theodor Wille, on account of the failure to deliver them to Crossman & Sielcken, and the refusal to deliver them to Clara Sielcken; in 1917, and that claim in respect thereto must be for the loss sustained, on account of the depreciation in the value of the securities, due to the application thereto of exceptional war measures, then, and in that event, claim is herein made as follows:

Balance of Dollar accounts in the amount of		$104,048.49
Balance of Mark Accounts, as follows:		2288
(a) to (e) Par. 14	M. 442,443.54	
Coupons on Crossman Sielcken bonds	1,200,712.00	
Peimann, Ziegler & Co. Settlement	1,032,262.35	
In the total amount of		M. 2,675,417.89

Depreciation in the value of the securities, in the amount of M. 7,178,577.40 from October 8, 1917, to September 20, 1921, or, if the Commission finds that claimants are not entitled to depreciation after the repeal of exceptional war legislation, then to January 10, 1920. 2289

C.

If the Commission finds that claimants are not entitled to the market value of the German securities as a debt from Theodor Wille, on account of the failure to deliver them to Crossman & Sielcken, and the refusal to deliver the securities to Clara Sielcken, in 1917, and that claim in respect thereto must be for the loss sustained, on account of the depreciation in the value of the securities, due to the application thereto of exceptional war measures, and further finds that claimants are not entitled to a credit to their account in the amount of their interest in the payment from Peimann, Ziegler & Company to Theodor Wille, but only to a credit of a propor-

2290 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

tionate part of the cash payment, and that claim in respect to the balance must be for the loss sustained, on account of the depreciation in the value of the securities accepted by Theodor Wille, due to the application thereto of exceptional war measures, then, in that event, claim is herein made as follows:

Balance of Dollar accounts in the amount of		$104,048.49
Balance of Mark Accounts,		
2291 as follows:		
(a) to (e) Par. 14	M. 442,443.54	
Coupons on Crossman & Sielcken bonds	1,200,712.00	
Cash in Peiman, Ziegler & Co. Settlement	184,262.35	
Coupons on Peimann, Ziegler & Co. Bonds.	74,000.00	
In the total amount of		M. 1,901,417.89

Depreciation in the value of the securities in the amount of M. 7,178,577.40 from October 8, 1917, to September 20, 1921, or, if the Commission finds that claim-
2292 ants are not entitled to depreciation after the repeal of exceptional war measures, then to January 10, 1920; depreciation in the value of securities in the amount of M. 98,000.00, paid by Peimann, Ziegler & Company, from November 1, 1918, and of securities in the amount of M. 750,000.00 from June 30, 1919, to September 20, 1921, respectively, or in the event that the Commission finds that claimants are not entitled to depreciation subsequent to the repeal of exceptional war measures, then to January 10, 1920, respectively.

(26) Claim is, in summary, as follows:

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2293

Amount	*Rate*	*Dollar Amount*	*Interest Date*
Claim A. $1,488,573.82			
M. 8,653,283.29	.16	$1,384,525.33	January 1, 1920
$ 104,048.49	—	104,048.49	October 8, 1917
Claim B.–I–$1,451,016.33			
M. 2,675,417.89	.16	$ 428,066.86	January 1, 1920
7,178,577.40	.128006	918,900.98	October 8, 1917
$ 104,048.49	—	104,048.49	October 8, 1917
Claim B.–II–$1,374,162.48			
M. 2,675,417.89	.16	428,066.86	January 1, 1920
7,178,577.40	.1173	842,047.13	October 8, 1917 2294
$ 104,048.49	—	104,048.49	October 8, 1917
Claim C.–I–$1,385,455.42			
M. 1,901,417.89	.16	$ 304,226.86	January 1, 1920
7,178,577.40	.128006	918,900.98	October 8, 1917
98,000.00	.125506	12,299.59	November 1, 1918
750,000.00	.061306	45,979.50	June 30, 1919
$ 104,048.49	—	104,048.49	October 8, 1917
Claim C.–II–$1,299,522.88			
M. 1,901,417.89	.16	$ 304,226.86	January 1, 1920
7,178,577.40	.1173	842,047.13	October 8, 1917
98,000.00	.1148	11,250.40	November 1, 1918
750,000.00	.0506	37,950.00	June 30, 1919 2295
$ 104,048.49	—	104,048.49	October 8, 1917

(27) The claimants are herewith duly filing with the American Agent the waiver in triplicate originals, in accordance with the Order of the Commission of March 25, 1925, which waiver the American Agent is requested to file with the Commission, in the event that an award is rendered with respect to the mark debts aforesaid.

WHEREFORE, upon the facts herein set forth, and the evidence filed in support thereof, the Columbia Trust Company (now the American Exchange Irving Trust Company), John S. Sorenson and Thorleif S. B. Nielsen, the claimants, hereby make claim against Germany, under the Treaty of Berlin of August 25, 1921, for:

(A) The sum of $1,488,573.82, together with interest

2296 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

at the rate of 5% a year on $104,048.49 thereof from October 8, 1917, and on the remaining $1,384,525.33 thereof from January 1, 1920, to the date of payment, respectively, or

(B) If the Commission finds that claimants are not entitled to the market value of the German securities as a debt from Theodor Wille, on account of the failure to deliver the securities to Crossman & Sielcken and the refusal to deliver them to Clara Sielcken in 1917, but that
2297 claimants are entitled to compensation for the loss sustained on account of the depreciation in the value of the securities, due to the application of exceptional war measures thereto, then (I) the sum of $1,451,016.33, together with interest at the rate of 5% a year on $1,022,949.47 thereof from October 8, 1917, and on the remaining $428,066.86 thereof from January 1, 1920, to the date of payment, respectively; or (II), if depreciation is not allowed for the period subsequent to January 10, 1920, then the sum of $1,374,162.48, together with interest at the rate of 5% a year on $946,095.62 thereof from October 8, 1917, and on the remaining $428,066.86 thereof from January 1, 1920, to the date of payment,
2298 respectively; or

(C) If the Commission finds that claimants are not entitled to the market value of the German securities as a debt from Theodor Wille, on account of the failure to deliver the securities to Crossman & Sielcken, and the refusal to deliver them to Clara Sielcken in 1917, but that claimants are entitled to compensation for the loss sustained on account of the depreciation in the value of the securities, due to the application of exceptional war measures thereto, and further finds that claimants are not entitled to a credit to their account in the amount of their interest in the payment from Peimann, Ziegler & Company, but only to a credit of their proportionate part of the cash payment and are entitled to compensation in respect to the balance for the loss sustained on account of the depreciation in the value of the securities accepted

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2299

by Theodor Wille, due to the application thereto of exceptional war measures, then (I) the sum of $1,385,455.42, together with interest at the rate of 5% a year on $1,022,949.47 thereof from October 8, 1917, on $12,299.59 thereof from November 1, 1918, on $45,979.50 thereof from June 30, 1919, and on the remaining $304,226.86 thereof from January 1, 1920, to the date of payment respectively; or (II), if the Commission finds that claimants are not entitled to depreciation subsequent to January 10, 1920, then the sum of $1,299,522.88, together with interest at the rate of 5% a year on $946,095.62 thereof 2300
from October 8, 1917, on $11,250.40 thereof from November 1, 1918, on $37,950.00 thereof from June 30, 1919, and on the remaining $304,226.86 thereof from January 1, 1920, to the date of payment respectively, as provided for in said Treaty, together with a proper allowance for costs and attorneys' fees and such other and further relief as this Honorable Commission may deem just and equitable.

Dated, October 26, 1927.

Attest:

AMERICAN EXCHANGE IRVING TRUST COMPANY,
formerly the Columbia Trust Company, as 2301
Executor of the Last Will and Testament of
Hermann Sielcken, deceased.

By:

ORRIN R. JUDD
Vice-President.

JOHN S. SORENSON

THORLEIF S. B. NIELSEN

(Seal)
H. MAJOR
Asst Secy

State of New York,
County of New York, ss:

ORRIN R. JUDD, being duly sworn, says:

I am a Vice-President of the American Exchange Irving Trust Company, formerly the Columbia Trust Com-

2302 *Exhibit B Annexed to Answering Affidavit of Selden Bacon.*

pany, which, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, is one of the claimants above named, and am acquainted with the facts set forth in the foregoing memorial. I have read said memorial and know the contents thereof and the same is true to my own knowledge, except as to the facts therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

ORRIN R. JUDD

2303 Sworn to before me this
26th day of October, 1927.
G. E. Osborne
Notary Public
Queens County No. 1298
Cert. filed in N. Y. Co. No. 102 Reg. No. 8064
Cert. filed in Bronx Co. No. 6 Reg. No. 2824
Cert. filed in Kings Co. No. 37 Reg. No. 8041
Term expires March 30, 1928
(Seal.)

State of New York,
2304 County of New York, ss:

JOHN S. SORENSON, being duly sworn, says:

That he is one of the claimants above named; that he has read the foregoing memorial and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

JOHN S. SORENSON

Sworn to before me this
26th day of October, 1927.
Emilie B. Bender
Notary Public,
Kings County No. 148
Cert. filed in N. Y. County No. 340
New York Register's No. 8298
My Commission Expires March 30, 1928
(Seal.)

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2305

State of New York,
County of New York, ss:

THORLEIF S. B. NIELSEN, being duly sworn, says:

That he is one of the claimants above named; that he has read the foregoing memorial and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

THORLEIF S. B. NIELSEN 2306

Sworn to before me this
27th day of October, 1927.
Emilie B. Bender
Notary Public,
Kings County No. 148
Cert. filed in N. Y. County No. 340
New York Register's No. 8298
My Commission Expires March 30, 1928
(Seal.)

2307

2308 **Exhibit C Annexed to Answering Affidavit of Selden Bacon.**

8304
Resp. Irv. Tr. Ex. 10095, a
1/18/35 (L. C.)

BEFORE THE MIXED CLAIMS COMMISSION
UNITED STATES AND GERMANY

ORGANIZED UNDER THE AGREEMENT OF AUGUST 10, 1922, BETWEEN THE UNITED STATES AND GERMANY.

2309 UNITED STATES OF AMERICA On behalf of COLUMBIA TRUST COMPANY (now the American Exchange-Irving Trust Company), as Executor of the last Will and Testament of Hermann Sielcken, deceased, and JOHN S. SORENSON and THORLEIF S. B. NIELSEN, surviving partners of the firm of Crossman & Sielcken,

vs.

GERMANY and the firm of THEODOR WILLE,

2310 Impleaded.

Docket No. 8304
List No. 6207

Answer of the German Agent Under Rule IV-b (1)

Note: The "Memorial" referred to in the present Answer is the "Memorial for Claim" prepared and submitted by the claimants, which "Memorial for Claim" is attached as "Annex I" to the "Memorial" of the United States in Support of the "Claim" filed by the Agent of the United States.

I. *Statements as to Facts.*

The facts as stated in the Memorial will not be disputed, with the following exceptions:

a) In Par. (1) of the Memorial it is contended that Hermann Sielcken was, on all dates pertinent herein and

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until the time of his death on or about October 8, 1917, a citizen of the United States, "residing in the United States, although temporarily residing in Germany at the time of his death"; it is also contended that Clara Sielcken is, and was on all dates pertinent herein, a citizen of the United States, "residing in the United States, although in Germany at the outbreak of the War." These contentions are contradicted by the facts that the late Hermann Sielcken and his wife owned, maintained, and inhabited a palatial estate near Baden-Baden (in Germany) while in New York they had merely a suite in a hotel; that in the last Will and Testament of March 23, 1914 (Exh. 4), which Last Will and Testament was apparently made in New York, Hermann Sielcken called himself "Hermann Sielcken, of Baden-Baden, Germany"; and in the same Will he directed that all of his estate should be administered and distributed in Germany, under the laws and in the tribunals of "Germany, my domicile"; and that in the Decree of the Surrogate's Court of the County of New York of January 26, 1918 (*Exhibit 6-B*), *admitting* the said Will to probate, it was expressly stated that Hermann Sielcken was at the time of his death "a resident of Baden-Baden, Germany."

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b) In Par. (2) of the Memorial it is contended that Hermann Sielcken "left a last Will and Testament, wherein he named 'Columbia-Knickerbocker Trust Company,' executor with respect to all property left by the said Hermann Sielcken in the United States of America, and particularly with respect to the liquidation of the firm of Crossman & Sielcken * * *"

This statement is neither accurate nor complete. The pertinent provisions of said Will read as follows:

> "I appoint Gustav Diederichsen, and his brother Heinrich Diederichsen of Kiel, Germany, and my brothers-in-law, Carl Isenberg and Richard Isenberg, residing in Germany, the executors of this my will.
>
> "I also appoint the 'Columbia Knickerbocker Trust Company of New York, executor of this will, *for the*

2314 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

purpose of collecting and converting into cash all my property situated in the United States of America, and I direct said Company to transmit and pay over all the net proceeds thereof to my said executors in Germany for administration and distribution by them.

"It is my wish that all my estate should be administered and distributed in Germany, under the laws and in the tribunals of Germany, my domicile.

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"Whereas, since the death of my late partner, George W. Crossman, in the firm name of Crossman & Sielcken, I have become the sole owner of the property and business of that firm and I have admitted into partnership John S. Sorenson and Thorlief S. B. Nielsen to continue the business of the said late firm under the same firm name; and the Articles of Co-partnership made between us, bearing date the 2nd day of June, 1913, provide that in case of my death the said partnership shall come to an end and that *it shall then be the duty of the surviving*

2316 *partners to transfer and pay over to the executor of my Will all the capital property and business of the said firm.*

"It is my desire that my executor, the *Columbia Knickerbocker Trust Company should leave the management of the firm business for liquidation in the hands of the said Sorenson and Nielsen, to the largest possible degree under the direct* supervision of the said trust Company."

This language shows that the task entrusted to the Columbia Knickerbocker Trust Company was more restricted than would appear from the above statement in the Memorial.

c) In Par. (3) of the Memorial it is contended that after the Will of March 23, 1914, had been admitted to probate the Columbia Trust Company "duly qualified

and entered upon the discharge of its duties as, and now is, such executor."

Even assuming that the Columbia Trust Company did acquire the legal status of executor, the contention that said Company "now is executor" would not be supported by the evidence on record. The record is silent as to the activities of the Columbia Trust Company in its alleged capacity as executor, regarding the progress made in the liquidation of the estate, and regarding the ultimate fate of the net proceeds thereof. The Columbia Trust Company is requested to make a full and detailed statement covering these points, which statements should be accompanied by documentary evidence to support its correctness. The Columbia Trust Company is especially requested to state whether it ever made a final report or accounting to the Surrogate's Court or to the Alien Property Custodian, to the German executors or to the residuary heir, and whether it was ever discharged by any of these agencies and/or persons.

d) A similar disclosure is requested concerning the activities of the claimants John S. Sorenson and Thorleif S. B. Nielsen with regard to whom it is contended in Par. (7) of the Memorial that, in their capacity as liquidators, they are still entitled "to collect and receive all of the assets and credits of said firm of Crossman & Sielcken and to procure and recover upon any and all causes of action and claims of whatever nature, existing in favor of such firm at the time of its dissolution * * *"

It is pertinent to remark, in this connection, that in a cable to the firm of Theodor Wille under date of February 4, 1928, Mr. Nielsen stated: "* * * I have had nothing to do with the liquidation since estate settled with me in June nineteen hundred twenty-one * * *."

e) The figures referred to in Par. (10) to (14) of the Memorial are not in all respects correct. The discrepancies between the figures presented in the Memorial and the correct figures, as shown by the books of the

2320 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

firm of Theodor Wille, will be referred to hereafter in dealing with the individual items of the claim.

f) In Par. (15) and (16) of the Memorial it is contended that Gustav Diederichsen and Georg Georgius in their negotiations with Clara Sielcken, concerning the delivery of the bonds, pertaining to the estate, acted in their capacity "as members of the firm of Theodor Wille." This contention is not borne out by the evidence of record and will not be admitted.

2321 g) In the same paragraphs (15 and 16) it is contended that Mrs. Clara Sielcken demanded of Gustav Diederichsen and Georg Georgius the delivery of bonds pertaining to the estate for the purpose of taking them out of Germany and/or converting them into neutral exchange, and that Georg Georgius and Gustav Diederichsen refused complying with such request. The evidence submitted in support of those contentions is not conclusive (Exhibits a to m).

h) In Par. (17) of the Memorial reference is made to the Will of Hermann Sielcken, drawn at Baden-Baden on February 18, 1917. In Par. (18) of the Memorial it is
2322 contended that the executors appointed under the same Will decided not to take, and did not take, over the property of Crossman & Sielcken or any property pertaining to the estate of Hermann Sielcken, deceased, or to the firm of Crossman & Sielcken.

These contentions are not supported by the evidence of record and will not be admitted.

It should be noted that on March the 29th, 1920, the executors appointed under the Will of February 18th, 1917 (not those appointed under the Will of March 23, 1914) entered into an agreement with the Columbia Trust Company wherein it was expressly stated that the said executors had duly qualified as such, that they are engaged in the administration and settlement of the estate of Hermann Sielcken, deceased, and they have paid all debts and claims against the estate of said decedent with certain exceptions, and that they still hold undistributed assets of the estate (Exhibit 6 C).

Exhibit C Annexed to Answering Affidavit of Selden Bacon 2323

i) In Par. (19) of the Memorial it is contended that members of the firm of Theodor Wille prepared a report for the Treuhaender fuer das feindliche Vermoegen, and that the Treuhaender thereupon took under his administration the property so reported. As a matter of fact the report to the Treuhaender was prepared by Gustav Diederichsen in his capacity as executor and was signed by Clara Sielcken. In replying to the report the Treuhaender stated the following:

"In view of the patriotic sentiment shown by your 2324
deceased husband through substantial subscriptions and donations of various kinds I refrain from the measures usual in other cases, such as the restriction of the enjoyment of interest, etc.

Only in case you should effect a substantial alteration of your property you will please inform me.

(Exhibit m)

II. *Issues of Law.*

A. *The claim is not properly presented.*

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1) The Columbia Trust Company has never been executor of the Hermann Sielcken Estate. The Letters testamentary granted unto the Columbia Trust Company by the Surrogate's Court of the County of New York, on January 26, 1918 (Exhibit 6, Annex B), were manifestly issued in ignorance of the Joint Testament of February 18, 1917 (Exhibit 8, Annex A), superseding the Testament of March 23, 1914 (Exhibit 4). The said Letters Testamentary were, therefore, devoid of legal effect.

The agreement of March 29, 1920 (Exhibit 6, Annex C), could not possibly vest in the Columbia Trust Company the legal character of executor not provided for in the Will of Hermann Sielcken. Whatever may have been the intention of this instrument, its legal effect was,

2326 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

at best, to ratify the preceding administrative acts of the Columbia Trust Company and to confer upon the said Columbia Trust Company a limited power of attorney derived from the authority of the German executors.

Even under the assumption that the Columbia Trust Company did obtain the position of executor of the Will of Hermann Sielcken, deceased, of March 23, 1914, the record fails to support the contention that the author-
2327 ity to act in such capacity still exists.

And even under the assumption that such authority still attaches to the Columbia Trust Company, the said authority would not include the right to make the instant claims for the reason that these claims do not constitute a part of the property of Hermann Sielcken, deceased, which is "situated in the United States of America."

2) The right of John S. Sorenson and Thorleif S. B. Nielsen to act in their alleged capacity of Liquidators of the firm of Crossman & Sielcken, will depend on the question whether or not the liquidation proceedings are still pending and whether said Sorenson and Nielsen have ever been discharged.

2328 That John S. Sorenson and Thorleif S. B. Nielsen are not entitled to make the present claim in their capacity of partners of the firm of Grossman & Sielcken, is manifest from the record as it stands. According to the Partnership Agreement (Exhibit 2, Annex D) John S. Sorenson and Thorleif S. B. Nielsen never had any right or interest of their own in any property or other asset belonging to the firm of Crossman & Sielcken. The entire business capital was owned by Hermann Sielcken alone, and he alone had to bear and pay all losses of the firm. After the partnership had been dissolved by the death of Hermann Sielcken, the entire business capital became a part of the Hermann Sielcken Estate. There was no liquidation of the firm in the sense of a distribution of the business capital among the surviving members of the dissolved partnership. Under Article II of the Partnership Argeement, the surviving partners

Exhibit C Annexed to Answering Affidavit of Selden Bacon 2329

had merely to transfer and pay over to the executor of Hermann Sielcken the capital and also all property and business of the firm. It is illustrative, in that respect, that apparently the entire business capital of the firm of Crossman & Sielcken was taken over by the Alien Property Custodian under the Trading with the Enemy Act, no exception being made with regard to any portion of the business capital in favor of Messrs. Sorenson and Nielsen. The interest of John S. Sorenson and Thorleif S. B. Nielsen was confined absolutely 2330
to their share of 12 1/2 per cent of the net profits of the business.

Assuming that the claims made in the instant case are valid, and assuming furthermore that the value of these claims would increase the net income for the last business year, the only right of said Sorenson and Nielsen would be that of making claim against the Estate of Hermann Sielcken for their share in such additional net profits of the business. Whether or not even such a claim could be asserted is doubtful in the light of the provision of Article XIII of the Partnership Agreement. According to this article, neither of the two persons in question is entitled to bring any action against 2331
the Estate of Hermann Sielcken for any share in the profits of the business, other than or different from that fixed and established by the balance sheets.

3) It will be contended in particular that the accounts carried by the firm of Theodor Wille in the name of "Hermann Sielcken" (Exh. 15, 16, 17, 18, and Annex C of Exhibit 19) were, since Hermann Sielcken's death subject to the unrestricted disposition of Mrs. Clara Sielcken and/or the German executors in the same way as during Hermann Sielcken's lifetime they had been subject to his personal disposition.

The significance of the foregoing objections is not restricted to that of a technical procedural defence. They have a direct bearing on the merits of the claims presented against the firm of Theodor Wille in that the claimants attempt to construct separate debts due to that

2332 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

part of Hermann Sielcken's estate which was formerly invested in the partnership of Crossman & Sielcken, while, if the relations between the firm of Theodor Wille and the estate of Hermann Sielcken are considered as a whole, such an indebtedness of Theodor Wille would clearly not exist. The separation of that part of the estate of Hermann Sielcken which was formerly invested in the partnership of Crossman & Sielcken is not merely highly technical and artificial, but also without foundation in the partnership agreement and in the Will of
2333 Hermann Sielcken. Even as a matter of practical business procedure a separate consideration of the legal relations originating from transactions of the former partnership is devoid of any appearance of justification after the proceeds of the liquidation of the said partnership have been turned over to Mrs. Sielcken, the only residuary heir.

B. *The claim against the firm of Theodor Wille.*

Insofar as the claim is based on debts allegedly due from the firm of Theodor Wille, the defense is presented
2334 by the debtor firm in a written argument which is filed herewith as Exhibit n, which is supported by a folder of evidence, filed herewith as Exhibit o, and which argument, by reference, is made part of the present Answer.

The defense may be summarized as follows:

1) All legal relations which have ever existed between the firm of Theodor Wille, on the one hand, and Hermann Sielcken and/or his estate and/or the firm of Crossman & Sielcken, on the other hand, have been finally settled through correspondence between the firm of Wille, on the one hand, and Clara Sielcken and Mr. Nielsen, on the other hand. Moreover, the correctness of the accounting rendered by Theodor Wille has been admitted by implication through the failure of all persons possibly authorized to act on behalf of the estate of Hermann Sielcken, or any part thereof, to object against such accounting, and through the withdrawal of the claim against Theodor Wille in 1924 (Exhibit n p. 1, 2, 3).

Exhibit C Annexed to Answering Affidavit of Selden Bacon 2335

2) In the alternative it will be contended that the credit balances for which claim is made are partially based on an erroneous method of bookkeeping, that they have partly been satisfied by direct action, and that the remaining ones are more than covered by the balances due to Theodor Wille. In dealing with the individual items we follow the enumeration of par. 14 of the Memorial.

3) Balance due Crossman & Sielcken from Theodor Wille (Special Account), (14 a of the Memorial).

The correct amount of the credit balance, due Crossman & Sielcken from Theodor Wille, calculated as of April 6th, 1917, is M. 1,328,388.13, instead of M. 1,340,587.48, as stated in the Memorial. This credit balance is fully covered by the debit balance in the amount of M. 1,402,239.71, due to Theodor Wille under items 14 d, and 14 e, of the Memorial (Exhibit n, p. 4, 7 and 8). 2336

4) Credit balance due Crossman & Sielcken from Theodor Wille (Peimann, Ziegler & Co., Hamburg, Loan Account), (14 b of the Memorial).

This item is a part of the "Hermann Sielcken" account, presented under 14 c of the Memorial, and dealt with under point (5) *infra* (Exhibit n. p. 4, *et seq.*) Item 14 b of the Memorial is arbitrarily separated from this account and constitutes a partial duplication thereof. 2337

5) Credit balance due Crossman & Sielcken from Theodor Wille on "Hermann Sielcken" account (14 c of the Memorial). It appears that the claimants arrive at a credit balance on this account in the amount of M. 261,366.69, by arbitrarily eliminating therefrom credit items representing avails from securities accrued subsequent to October 8th, 1917, and debit items representing payment made by Theodor Wille to Mrs. Clara Sielcken after the death of Hermann Sielcken. A statement showing the actual development of this account is presented in the defendant's Reply (Exh. n, p. 5 and 6). It appears that this account was overdrawn for a

2338 *Exhibit C Annexed to Answering Affidavit of Selden. Bacon*

considerable period subsequent to April 6th, 1917, that in 1921 it showed a temporary credit balance on account of a postwar transaction, and that the credit balance remaining on September 1st, 1922, was satisfied by direct action of the parties (Theodor Wille and Mrs. Clara Sielcken).

6) Debit balance due Theodor Wille from Crossman & Sielcken on joint account Coffee Options in Hamburg (14 d, of the Memorial).

2339 And debit balance due Theodor Wille from Crossman & Sielcken on Hamburg Mark Account (14 e of the Memorial).

These items are in harmony with the books of Wille. The total of these two items M. 1,402,239.71, stated as of April 6th, 1917, exceeds by a sum of M. 73,851.58 the amount of M. 1,328,388.13, due Crossman & Sielcken from Theodor Wille on the same date on Special Account (14 a of the Memorial). (See Exhibit n, p. 7 and 8.)

7) Credit balance due Crossman & Sielcken on account of settlement Peimann, Ziegler & Co. (14 f of the Memorial). The total of this item should be M. 1,127,440.90,

2340 instead of M. 1,032,262.35. This total embraces German Government Loan in the amount of M. 848,000— and currency in the amount of M. 279,440.90. With regard to these assets there was no obligation on the part of the firm of Theodor Wille other than that to turn them over to Crossman & Sielcken and/or Hermann Sielcken and/or his estate. This has been done. The cash amount has been credited to the account of Hermann Sielcken and satisfied as a part thereof (par. 5 *supra*). The government Loans were disposed of according to instructions of Hermann Sielcken and/or Clara Sielcken (Exhibit n, p. 9 and 11).

In case it should be contended that the payments made by Peimann, Ziegler & Co. to Theodor Wille failed to satisfy the obligations of Peimann, Ziegler & Co., claim for additional payments should be made against this firm.

Exhibit C Annexed to Answering Affidavit of Selden Bacon 2341

8) Securities (14 g of the Memorial)

All the securities referred to in par. 14 g of the Memorial were disposed of according to instructions of Hermann Sielcken and/or Clara Sielcken (Exhibit n, p. 11). It is not evident for what legal reason the amount invested in these securities should be due as a debt from the firm of Theodor Wille.

Moreover, the claim has not been notified to the German Government within the time limit agreed upon between the two Governments (Exhibit o, No. 11). 2342

9) Credit balance due Crossman & Sielcken from Theodor Wille on Dollar Account (14 h of the Memorial).

It will be admitted that this credit balance was in existence on October 8th, 1917, in the amount of $196,619.68, which amount is more than covered by the balance due to Theodor Wille under item 14 i of the Memorial.

The remainder of item 14 h amounting to $100,330.32 as of the same date refers to the so-called Prado transaction. Under this transaction Theodor Wille owed to Crossman & Sielcken Marks, not Dollars. The correctness of this view was expressly agreed to by Mrs. Clara Sielcken in her letter of June 29, 1922 (Exhibit o, No. 33). The mark amount corresponding to the above dollar amount has been satisfied by direct action between Theodor Wille and Mrs. Clara Sielcken (Exhibit p. 8, 9, 12). 2343

10) Debit balance due Theodor Wille from Crossman & Sielcken on Boston and New Orleans Flour Account (14 i of the Memorial).

The dollar balance due to Theodor Wille should be increased by an amount of $26,989.80, representing the value as of October 8, 1917, of a loan amounting to $30,000, made by Theodor Wille to Mrs. Clara Sielcken after the war. The total due Theodor Wille as of the date of October 8th, 1917, would then amount to $220,018.41 which amount is substantially in excess of the dollar balance due Crossmann & Sielcken under Item 14 h of the Memorial (Exhibit n, pp. 13 and 14).

2344 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

C. *Bond Claim against the German Government.*

The financial liability of the German Government for the depreciation of the securities referred to in the Memorial will be contested for the following reasons.

1) The claim has not been notified to the German Government within the time limit agreed upon between the two Governments. The original petition filed by the claimants (Exh. o No. 11) is confined to the claims for
2345 mark and dollar accounts, but has no reference to the depreciation of bonds.

2) The claim for the depreciation of securities as presented in the Memorial disregards the fact that securities in the nominal amount of M. 1,000,000.— were disposed of in March 1917 upon instruction of Hermann Sielcken (Exhibit o, No. 35).

3) The evidence on record fails to show that the loss sustained by Hermann Sielcken Estate as a result of the depreciation of the German securities was proximately caused by the German war legislation.

2346 a) The evidence submitted in support of the claimants' contentions is in substance confined to the testimony of Mrs. Clara Sielcken, an interested witness. This evidence is not conclusive in itself. Moreover, it is in certain points in conflict with the evidence filed herewith (Exhibits a to m).

b) Even assuming that the statements of Mrs. Sielcken are correct, it would appear that the German executors were entitled to, and did refuse the delivery of the securities to Mrs. Sielcken for reasons other than the existence of German war legislation.

The securities, as well as any other part of the estate, were subject to the right of the creditors of the estate including the creditors of the former firm of Crossman & Sielcken. A complete delivery of the proceeds of the estate could not be made before the degree of the indebtedness to the said partnership was established which

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could not be done while the connection with the United States was interrupted.

On the other hand, Mrs. Sielcken being a resident of Germany, the delivery of the securities to her was not prevented by the German war legislation.

Even the Treuhaender did not forbid such delivery after the securities had been reported to him (Exhibit m).

In case the executors should have proceeded upon an erroneous conception of the German war legislation, such a mistake of the executors would not make Germany responsible for the results thereof.

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c) It is not shown by the testimony of Mrs. Sielcken, nor is it probable in itself, that the securities, had they been delivered to Mrs. Sielcken, would have been converted into currency or securities other than German bonds before Mrs. Sielcken obtained the opportunity to travel to the United States. While in the light of the evidence filed herewith, it is little probable that any intention of Mrs. Sielcken to leave Germany would have encountered difficulties on the part of the German authorities (Exhibits c-l), it is a notorious fact that American citizens remaining in Germany after the declaration of war used to meet with very serious difficulties on the part of the American and neutral authorities when applying for passports or vise (Exh. k). The record is silent on any attempts made by Mrs. Sielcken in that respect. A full disclosure is requested.

2349

d) In case the Commission should hold that Germany is liable in principle for the loss resulting from the depreciation of the securities, the German Agent respectfully requests permission to submit further arguments concerning the measure of damages.

Washington, D. C. November 6, 1928.

Of Counsel.
(M.v.d Decken)

Karl von Lewinski
Agent of Germany.

2350 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

The undersigned, Joint Secretaries of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement between the two governments signed at Berlin on August 10, 1922, do hereby certify that the foregoing, according to its purport, is a true copy of a record of said Commission.

In Witness Whereof, we have hereunto subscribed our names and affixed the seal of the said Commission at Washington, this 26th day of March, 1934.

2351 (Seal)

E. RUSSELL LUTZ,
American Joint Secretary.
ALFRED LEDORS,
German Joint Secretary.

2352

Exhibit D Annexed to Answering Affidavit of Selden Bacon. 2353

BEFORE THE MIXED CLAIMS COMMISSION
UNITED STATES AND GERMANY

ORGANIZED UNDER THE AGREEMENT OF AUGUST 10, 1922, BETWEEN THE UNITED STATES AND GERMANY.

UNITED STATES OF AMERICA on Behalf of COLUMBIA TRUST COMPANY (now Irving Trust Company), as Executor of the Last Will and Testament of Hermann Sielcken, Dec'd., and JOHN S. SORENSON and THORLEIF S. B. NEILSEN, surviving partners of the firm of Crossman & Sielcken, Claimants, and the firm of Theodor Wille, Impleaded v. GERMANY.	Docket No. 8304 List No. 6207

2354

This claim having come before the Commission for decision, the American and German Agents having been heard, the claim having been finally submitted, and due consideration having been had, the Commission decides that, under the Treaty of Berlin of August 25, 1921, and in accordance with its terms and under rules and decisions heretofore announced, the Government of Germany is obligated to pay to the Government of the United States on behalf of Columbia Trust Company (now Irving Trust Company) as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Neilsen surviving partners of the firm of Crossman and Sielcken, American Nationals, the sum of Five hundred fifty-eight thousand eight hundred twenty-seven dollars and eighty-five cents ($558,827.85), together with interest thereon at the rate of five per cent per annum from April 1, 1918, to date of payment. 2355

Done at Washington April 21, 1930

CHANDLER P. ANDERSON
American Commissioner.

W. KIESSELBACH
German Commissioner.

2356 **Exhibit E Annexed to Answering Affidavit of Selden Bacon.**

July 21, 1938.

Attorney General of the United States,
Department of Justice,
Washington, D. C.

Attention Mr. McNamara

In re Sorenson and Nielsen, etc. vs. Sutherland, as Alien Property Custodian, White, as Treasurer of the United States, and Zentral Einkaufsgesellschaft, defendants.

2357

My dear Sir:

The papers of which I desire copies from the Alien Property Custodian's files are all papers relating to the remittance to the Alien Property Custodian or alleged seizure by him of the sum of $100,000 held for account of Hermann Sielcken in Trust No. 1.

I would also like, if permissible under the practice of the office, to have a copy of the report of the Assistant
2358 Attorney General, Mr. Rhodes, to the Solicitor General, made in March 1930, recommending that no appeal be taken from the decree of December 30, 1929, in the Zentral Einkaufsgesellschaft case entitled in the United States District Court for the Southern District of New York. I find a number of references to this report of Mr. Rhodes and would be glad to see what it stated.

I am,

Yours respectfully,

SELDEN BACON
Counsel for Irving Trust Company as Executor of Hermann Sielcken, deceased.

Exhibit F Annexed to Answering Affidavit of Selden Bacon. 2359

Address reply to
"The Attorney General
Alien Property Bureau"
and refer to
Initials and number

SEW:HLJ
9-17-9-4394

DEPARTMENT OF JUSTICE 2360
WASHINGTON, D. C.

July 23, 1938.

Selden Bacon, Esq.,
c/o Duer, Strong & Whitehead,
15 Broad Street,
New York, New York.

Re: Sorenson & Nielsen etc. v. Sutherland, White and Z. E. G., United States District Court for the Southern District of New York, Equity No. 44-28

2361

Sir:

Your letter of July 21st in which you state that you desire copies of certain papers relating to the remittance to the Alien Property Custodian of the sum of $100,000 for the account of Hermann Sielcken in Alien Property Trust No. 1 has been received. You request also a copy of the report of Special Assistant Rhodes to the Solicitor General recommending that no appeal be taken from the decree of December 30, 1929 in the Zentral Einkaufs-Gesellschaft case.

Consideration will be given to your request, and you will be advised promptly as to the documents which may be properly furnished to you.

Respectfully,

For the Attorney General
SAM E. WHITAKER
SAM E. WHITAKER,
Assistant Attorney General

2362 **Stenographer's Minutes of 1929 Trial.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
vs.
2363 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

In Equity No. 44-28.

Before Honorable Francis G. Caffey, District Judge.

New York, December 20th, 1929; 2:00 P. M.

Appearances:

Barnes, Avery & Whiting, Solicitors for Plaintiffs, Earl B. Barnes, and George W. Alger, Counsel.

2364 Charles H. Tuttle, United States Attorney, Solicitor for defendants Sutherland and White.

Thomas E. Rhodes, Special Assistant to the Attorney-General, Counsel.

Arthur Garfield Hays, Solicitor for defendant Zentral Einkaufs-Gesellschaft.

Arthur Garfield Hays, and William Abramson, Counsel.

Opening statement of Mr. Barnes.

Mr. Barnes: This suit, if your Honor please, is brought under Section 9 of the Trading with the Enemy Act.

The plaintiffs are the surviving liquidating partners of Crossman & Sielcken, a New York copartnership.

There are two defendants, perhaps three defendants, the Alien Property Custodian, the Treasurer of the United

States, those two being made defendants as required by the provisions of the Act, and then a German corporation by the name of Zentraleinkaufs-Gesellschaft, to which, for the sake of brevity, we have learned to refer as Z. E. G.

The object of the suit is to secure payment to the plaintiffs from property of Z. E. G. which is held by the Custodian and the Treasurer of a debt which the plaintiffs claim was owing to them by Z. E. G. The amount claimed is $380,761 with interest.

All of the defendants have appeared in the suit and have answered and are before your Honor.

2366 It is not the case with which you are most familiar, of a claimant endeavoring to get his own property back. We have had a great many of those claims. But this suit is brought under that provision of the Act which says that any person to whom a debt is owing may bring a suit to establish the debt. In other words, the Government has given practically an attachment remedy to American firms for the payment of their claims against enemies out of this fund.

The claim here arises out of transactions that took place in the spring of 1915, when Germany and England were at war and of course several years before this country entered the war. The defendant Z. E. G. at that time was 2367 the purchasing agency of the Imperial German Government.

The Court: Were the transactions completed prior to the entry of this country into the war?

Mr. Barnes: All of the transactions were completed in the spring of 1915, two years before this country entered the war.

The claim arises by reason of the seizure by the British Government of six shipments of food which were purchased in this country by the plaintiffs and were shipped to neutral Baltic ports on neutral vessels consigned to persons in Copenhagen.

These vessels on the way over were intercepted by the British and they seized these particular food cargoes and took them to a British port and condemned them upon the ground that they were contraband of war, that they

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were destined for consumption in Germany. That is how this particular litigation has arisen.

The plaintiffs' contention is that in purchasing and shipping these cargoes, they were acting merely as purchasing agents of the defendant Z. E. G.; that we consigned them to persons designated by Z. E. G. and that we were to be repaid by Z. E. G., our advances for the cost of the merchandise and our advances for the shipments and for the freight and for the insurance and a commission of 10%.

2369 That was the understanding between the parties, that we were acting over here to buy this stuff for Germany and to ship it under a 10% commission for our services and we were to advance the money.

The amount involved represents the invoice value, the freight, the insurance and the 10% commission on these six seized cargoes.

Of course what happened here took place fifteen years ago. The original arrangements were made in September of 1914. At that time Hermann Sielcken, the senior member of the plaintiffs' firm, Crossman & Sielcken, was in Germany. He had a summer place in Germany and it was his custom to go there every summer. At the time

2370 when this war suddenly broke out, as you recall, between the Allied Powers and the Central Powers, Mr. Sielcken and his family were in Germany. He died in 1917—

The Court: Before or after the United States entered the war?

Mr. Barnes: After the United States entered the war, on October 8, 1917.

I might say here that the defendant Z. E. G. was organized in January, 1915, as a corporation and that it took over and assumed all of the obligations and business transactions that had theretofore been conducted by a German Imperial Government purchasing agency, known as the Reichseinkauf. Mr. Sielcken's arrangements over there were made with the Reichseinkauf originally.

Substantially the only evidence that we have of the arrangement that he made over there with Z. E. G. or its predecessor, the Reichseinkauf, is in the form of writings

which passed between the Reichseinkauf and Z. E. G. and Mr. Sielcken together with certain admissions that are made by the defendant Z. E. G. in its answer to our Memorial before the Mixed Claims Commission of the United States involving this same question.

In other words, not only have we filed a suit here under the Trading with the Enemy Act, but we also filed a Memorial before the Mixed Claims Commission against Germany and Z. E. G. and in that Memorial we set out and stated a number of facts and exhibits and Z. E. G. in Germany answered that Memorial and made certain admissions therein on which we also rely as evidence of the 2372
arrangements between the parties.

The Court: Are they required to answer when you file a Memorial?

Mr. Barnes: Yes, and they did answer.

We feel that these letters, in conjunction with the matter in which the business was done, clearly show that Crossman & Sielcken in purchasing and shipping these cargoes were acting as agents of the defendant Z. E. G.

Without going into the details of the evidence, I should like to state that they show not only that Z. E. G. told us what to buy, not only that they told us of whom to buy, but that they told us to whom it should be consigned, 2373
they told us how the bills of lading should be made out, and they told Hermann Sielcken how he should communicate with his friends over here, as they were called in the correspondence.

Every detail of the business apparently was dictated by Z. E. G. to Mr. Sielcken when he was over in Germany and we claim that a reading of this correspondence and the fact that the goods were consigned to agents appointed by Z. E. G., paid by Z. E. G., will clearly indicate that the relations between the parties were really those of principal and agent, that we were simply buying this stuff on a 10% commission. The original agreement specifies that we were to be paid a 10% commission, the word "commission" is used.

Of course, in view of the British ascendancy of sea power at the time, it was necessary to camouflage or dis-

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guise in a way the German ownership in these transactions. Otherwise the goods would be intercepted on the high seas and confiscated.

But whatever was done in that line was done under instructions from the other side.

So our first point, our chief point and our main point is that on the correspondence that will be introduced in evidence before your Honor here and on the agreed facts stipulated as to how the work was done you can reach no other conclusion but that we were really agents working on a commission basis and therefore we would fall
2375 within the familiar rule that an agent is entitled to be reimbursed for his advances made in the conduct of his principal's business and that we are not to suffer the loss of these cargoes by reason of the fact that through no fault of ours they were intercepted on the high seas and condemned by the British Prize Court.

So far as the Government is concerned in this action the Alien Property Custodian and the treasurer of the United States, as I understand it, their position is chiefly that of a stakeholder. This particular fund, as I understand it, under the Settlement of War Claims Act, if it is not paid to us as creditors of the enemy, will go into
2376 the German Reparations Fund to be paid to the creditors of Germany. The United States Government has not any financial interest whatsoever in the result of our particular litigation here. The money will undoubtedly go to pay Germany's creditors. If we are not a creditor so established in this action, it will go to pay other creditors who are established before the Mixed Claims Commission.

So far as the defendant Z. E. G. is concerned, there have been several defenses interposed, I think seven or eight. One of them is that there was an express agreement between Mr. Sielcken and the Reichseinkauf, that Mr. Sielcken would take the risk of seizure for doing this business, that is that there was an express understanding. Upon that point we think that the defendants will be unable to establish such a defense. Of course, if such a defense is established to your Honor's satisfaction, it will be a good defense.

Another defense is that the agreement was not an agency agreement at all, but was really a sale by Crossman & Sielcken to the Reichseinkauf and that it was expressly understood that title to the merchandise should remain in Crossman & Sielcken until it was actually delivered safely in the Baltic seaports.

We think on that point that even if there was a sale nevertheless under the form in which the transaction went through at the time of the seizure, title had passed to Z. E. G. and the risk was on them and therefore we are entitled to be paid.

There are several other defenses which we think are 2378
wholly insufficient in law. I shall not endeavor to go into them because I have no doubt Mr. Hays can explain them very much better than I can.

Opening Statement of Mr. Hays.

Mr. Hays: If your Honor please, the defendant Z. E. G. relies chiefly upon the fact that the original notification given to Crossman & Sielcken by the Reichseinkauf, which was succeeded by the Z. E. G., imposed no obligation on them whatever and so I am going to ask you to look at Exhibit A attached to the answer.

Apparently at the time this letter was written, in 2379
September, 1914, notification was given by Mr. Richter for the Reichseinkauf, which might have been given to any number of parties, not merely to Sielcken.

It merely confirmed the fact that the Reichseinkauf in Hamburg had been commissioned to receive in Baltic ports cargoes of food stuffs, and then it said the Reichseinkauf will pay for those cargoes the value c. i. f. Baltic seaports; that is the value of invoice plus freight and insurance expenses plus 10% commission.

In other words, the German Government, anxious to get food stuffs, might have given this notification broadcast, not merely to Sielcken.

The main question in this case is whether they were obliged to pay for cargoes even though the cargoes were not received in Baltic seaports.

That notification is the very basis of this case. Without that of course the plaintiff could have no claim. The first question is, what is meant by that notification?

Richter merely advises the person to whom it goes that the Reichseinkauf has been commissioned to receive. He does not say even that they will receive. There is no contract to buy. Nobody is appointed agent. He says they are commissioned to receive certain goods in Baltic seaports.

I say to your Honor that we must assume they were reasonably intelligent people when they did that. Had
2381 they intended to appoint anybody their agent over here or had the goods when shipped, been owned by anybody in Germany, the goods would have immediately been subject to seizure as enemy goods.

I cannot conceive of any government establishment doing such a preposterous thing as agreeing to take title to goods before those goods reached the Baltic seaports and I believe that an instrument like this must be construed based upon the reasonable probabilities as they existed at the time.

So long as you had neutral goods on neutral vessels destined for neutral ports, they were not, under Inter-
2382 national Law, at that time, subject to seizure.

This was conditional contraband. It would have been necessary to prove that the goods were going to the armed forces of the enemy.

You will note that about twenty-four cargoes were shipped and not one of these cargoes was seized until April, 1915.

In other words, in September, 1914, at the time this agreement was made, I think it could fairly be assumed that food stuffs, conditional contraband on neutral ships consigned to neutral ports would not be subject to seizure. But if they were enemy owned, they would.

Our opponents take the position that Crossman & Sielcken were agents which would postulate the fact that these goods were enemy owned at the time they were bought. I say that nobody in his senses would have

made that agreement in Germany at that time and that the parties could not have understood it so.

Nor did they make that agreement because, if you will read the language there, you will see that all they said was that they were to receive these goods at Baltic seaports.

It is true that they said that they would pay for the cargoes c. i. f. and "c. i. f." ordinarily means that title passes on delivery to steamer. Yet the term "c. i. f." is used here with a different signification. Here those initials are used merely to indicate the bill on which payment is to be made and on which commission is to be 2384 paid.

But there is something still more significant in this instrument which shows that it means what I say and that Crossman & Sielcken were not agents and that this was not any contract. If your Honor will look at the last paragraph you will find that it reads:

"The confirmation can be cancelled by us at any time and expires of itself on the proclamation of peace. Cargoes which are on their way are in such cases still to be received and also goods which have been contracted for shipment as well as goods which have previously been purchased and ordered for the purposes of this contract." 2385

If Crossman & Sielcken had been agents, of course that paragraph would not have been in there. They obviously would have been entitled to payment.

If you will take the clause "Cargoes which are on their way are in such cases still to be received," it is obvious that the cargoes were not to be paid for under ordinary circumstances until they were to be received because otherwise there would have been no reason for that clause in this contract.

Not only is this notification very clear that the Reichseinkauf was to pay for nothing except for cargoes that were received at Baltic seaports and not only is that the probability of the situation and obviously the way these parties would have framed their transaction, but on every bill of lading appears a statement that Crossman & Sielcken are the owners of the goods.

Not only that, but their insurance certificates say that there is no enemy interest in the goods.

It is admitted that in shipping the goods, the central purchasing agency advised Crossman & Sielcken to put that stamp upon the invoices and upon the bills of lading and it was necessary to put that stamp on or the goods would not have gone through.

But according to our contention, that stamp actually represented the facts as they existed. Crossman & Sielcken were the owners of the goods and there was no enemy interest in the goods and there would not be until those
2387 goods were purchased at Baltic seaports.

In other words, these affidavits actually represented the facts. It can hardly be assumed in court that Crossman & Sielcken made a false affidavit merely because they were asked to do it.

The Court: In what connection were those affidavits made?

Mr. Hays: On the bills of lading.

Another very interesting point that answers the agency argument seems to me to be this: It is obvious that under this notification, if Crossman & Sielcken had bought cargoes in the United States and had shipped them to Baltic
2388 seaports, they could have sold those cargoes in Baltic seaports to anybody they chose. They were not bound by this notification. The central purchasing agency agreed to pay a certain amount at Baltic seaports but Crossman & Sielcken never said that "All cargoes we buy will be bought for your account."

If Crossman & Sielcken had the right to buy any amount of food stuffs than they desired and if they had the right to ship those cargoes to anybody, obviously they were not the agents of the Reichseinkauf.

The Court: How were the bills of lading drawn? Were they drawn to the order of Crossman & Sielcken?

Mr. Hays: Or to the consignees who were named.

Summing up my argument, it is obvious that this was not an agency because Crossman & Sielcken could have sold to anybody in Baltic seaports.

The Court: I do not quite follow you. You say that the bills of lading were drawn to the order of consignees;

that is at the time of shipment the bills of lading designated to whom the delivery was to be made. You say notwithstanding that, that after shipment, Crossman & Sielcken were in such control that they could have transferred ownership?

Mr. Hays: Yes, sir, until the goods arrived, because they had not obligated themselves to do anything. The Reichseinkauf merely agreed to accept those cargoes in Baltic seaports.

In addition to this evidence, it appears from the notification itself, from the bills of lading, and from the invoices that the relationship of principal and agent did not 2390
exist. And then there is also a deposition of one named Frisch who handled these transactions with Sielcken. Frisch was connected with the central purchasing agency and his evidence seems to us to make it clear that it was understood that the risk of loss was to be on Crossman & Sielcken in the event that these goods were seized.

That is our main defense, that under this notification, there was no obligation on Z. E. G., and that the facts show an express agreement that Crossman & Sielcken should take the risk of the voyage.

Our next defense is this: Mr. Sielcken died on October, 1917. He had been in Germany from the outbreak of the 2391
war and on the outbreak of the war, he became an enemy alien. Although he was a naturalized American citizen, he was an enemy alien. On the outbreak of the war, the firm of Crossman & Sielcken was dissolved by the outbreak of the war.

The Court: There was no express dissolution was there? You mean as a matter of law, it was dissolved?

Mr. Hays: Yes, sir.

So in 1917, the situation was that Hermann Sielcken was in Germany and the firm was dissolved.

We claim that Mr. Sielcken had a right to collect whatever assets there were in Germany including any claims against Z. E. G. or the German Government just as the American partners would have a right to collect claims here. Any partner would have a right to collect debts.

He died in 1917, in October. After his death, his ex-

ecutors in Germany agreed to submit this claim against Z. E. G. to arbitration. On arbitration, the Tribunal found that Crossman & Sielcken had no claim.

The Court: Was that done on notice to the American partners?

Mr. Hays: It was done during the war. It was in 1918. So the question is whether the partner residing in Germany had a right to collect assets, whether he had a right to submit his claim to arbitration; and then the question arises whether if he had that right, his executors would have the same right.

2393 As I say, the Tribunal decided that the risk of loss was on Crossman & Sielcken and that there was no claim against Z. E. G.

The Court: Was that a sort of a declaratory judgment?

Mr. Hays: There was an agreement between the executors and Z. E. G., that the matter should be submitted to arbitration. We have the arbitration agreement here and the opinion of the arbitrators.

The Court: What did they arbitrate?

Mr. Hays: The question as to whether the Z. E. G. was liable.

2394 The Court: The same issue as is here?

Mr. Hays: Yes. And they decided against Crossman & Sielcken.

I should say the main question as to that would be whether the executors had the right to arbitrate the claims of the partners over here. I say they did have a right because on the dissolution of the partnership, Hermann Sielcken succeeded to that claim and his executors, after his death, succeeded to the claim and in time of war they had a right to collect any assets in Germany, and this was one of their assets.

If that were not so, how in the world would anybody in time of war be able to proceed on a claim in Germany even though he were there at the time?

Here is a partner in Germany. If he had a right to proceed and his executors had a right to proceed, they

had a right to leave these things to arbitration and all parties are bound by the decision of the arbitrators.

Further than that, Hermann Sielcken owned all the capital of Crossman & Sielcken. The other men were junior partners who had an interest in the profits. Hermann Sielcken owning all the capital, we claim he had a right over there to settle this thing with the German government and his executors had a right to leave it to arbitration.

The Court: Would ownership of all the capital make any difference to the plaintiffs here, if they were partners? 2396

Mr. Hays: I think it would, because a question might arise as to whether Hermann Sielcken who was in Germany, had a right to collect debts unless his interest in the firm was sufficient to make certain that the money did belong to him.

Further than that, we claim that after the arbitration by agreement between the executors and the Zentral Einkaufs Gesellschaft, the whole thing was settled somewhat different from the decision of the arbitrators. Under the decision of the arbitrators, 1/13th of the case was won by the Sielcken Executors and 12/13ths by the Zentral Einkaufs Gesellschaft. There was some issue about $30,000. 2397
The costs were to be borne in that proportion. After the determination of that arbitration, which left one question open, the executors arranged with the Z. E. G., that instead of the executors paying 12/13ths of the cost of the arbitration, they should pay 3/4ths of the cost and the Z. E. G. should pay 1/4th of the cost.

It was further agreed that Crossman & Sielcken might retain $31,000 which had theretofore been paid them on account of a shipment on the Steamship "United States." The $31,000 was retained by Crossman & Sielcken and is retained by Crossman & Sielcken up to this day so far as we know.

Only 3/4ths of the cost of the arbitration was paid by the Sielcken Estate instead of 12/13ths.

The Court: I did not quite understand that.

Mr. Hays: I say the Arbitration Tribunal left certain questions open. There were further questions under their

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decision that were to be determined according to the law of Denmark.

12/13ths of the cost of the arbitration was to be paid by the Sielcken estate and 1/13th by the Z. E. G. Then the Sielcken Estate arranged with Z. E. G. to settle it on this basis: The German Executors would pay 3/4ths of the cost of the arbitration and Z. E. G., 1/4th.

They further agreed that Crossman & Sielcken should retain $31,000 that had theretofore been paid Crossman & Sielcken on account of one shipment on the steamship "United States," which is not in issue here.

2399 In other words, even though those goods did not arrive, Crossman & Sielcken were paid $31,000 for them and Z. E. G. claimed the right to the return of that $31,000. It was agreed that Crossman & Sielcken should retain the $31,000. And we contend that Crossman & Sielcken or the Sielcken estate received a benefit by that settlement.

Our further point is that that settlement has been ratified. The arbitration took place in 1918. In 1919, one of the members of this firm was in Germany discussing the question of this arbitration. In 1920, letters passed between one of the members of this firm now bringing suit and Theodor Wille who was associated with Crossman &

2400 Sielcken in these transactions and Crossman & Sielcken were notified by letter that this whole thing had been settled and they confirmed receipt of that letter. That was in 1920.

Further acts of ratification we claim on the part of the plaintiffs, here occurred in 1924, when the plaintiffs filed a claim against the Central Purchasing Agency with the Mixed Claims Commission at Washington.

When Theodor Wille of Hamburg, who was the associate of the plaintiffs in these transactions—as I shall state later, there was a joint account—heard of that, he cabled over here. Crossman & Sielcken withdrew the claim. It was some three or four years later that they refiled the claim and that this suit was started.

So we claim that those acts constitute a ratification of the determination of the Tribunal and the subsequent agreement that occurred in Germany.

Those are our main defenses.

We also claim this: Crossman & Sielcken had a joint account with Theodor Wille in these shipments, Theodor Wille being in Hamburg. When these ships were seized and the loss was ascertained half of the loss was immediately charged against Wille. So our claim is, that the plaintiffs have only been damaged 50% because that was the extent of their interest.

We further claim that Wille should be a party to these proceedings.

I may say as to those last defenses, your Honor, that 2402
I am not at all sure of my law. If that were a situation where they were to account to Wille for half the profits and to charge Wille with half the losses, I am inclined to believe in all fairness that they would have a right to bring this suit themselves, even though they afterwards had to account. So, while I am presenting those defenses, I am not arguing them strenuously because I am inclined to think I may be wrong. If I find I am right and there is any case on appeal, I want to take advantage of those defenses.

The Court: Have you set them up in your answer?

Mr. Hays: Yes.

The Court: The absence of a necessary party? 2403

Mr. Hays: Yes, sir. But I am not sure enough of that point to make a strong argument here. I also have set up that this case is governed by German Law, the notification having been given in Germany, and that under the German law the risk of loss is on the shipper. I am not going to put in evidence of the German law because I am ready to rely upon the law here and I think my opponents also are. I realize that if we were to put in such evidence, I would have experts testifying in one way and they would have experts testifying in the other way and nothing would come of it so far as those defenses are concerned. So I am not going to press them here.

In substance our position is that this notification, Exhibit A, involved no obligation on Z. E. G., that there are many things that show that the risk of loss was on Crossman & Sielcken, such as the statements on the bills of

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lading that the matter was arbitrated, thereafter settled, and the settlement was ratified by the plaintiffs.

Opening statement of Mr. Rhodes.

Mr. Rhodes: May it please the Court, I represent the Alien Property Custodian.

As stated by Mr. Barnes, the position of the Government is in a large measure that of a stakeholder in that Congress has already provided for the disposition of all
2405 seized property. They have provided for the return of 100% of all seized property except that of Germany, enemy nationals; they get 80% and 20% is transferred to a special deposit account in the Treasury and is used in part in the payment of the awards of the Mixed Claims Commission in favor of the American Nationals who have claims against the German Government.

Section 25D of the Settlement of War Claims Act enacted March 10, 1928, 45 Stat. 254, and known as the "Settlement of War Claims Act"—

The Court: What is the citation?

Mr. Rhodes: 45 Stat. 254.

The Court: Have you got the reference to the Code?

2406 Mr. Rhodes: It is not in the Code. It was enacted after the Code.

The Court: But it ought to be in one of the supplements.

Mr. Rhodes: That is probably true, but I have not looked that up.

The Court: All right, I shall find it.

Mr. Rhodes: That provides that the property of the German Government seized by the Alien Property Custodian should be used in the payment of debts found to be due which were payable under the Trading with the Enemy Act and that the balance left, should be transferred to the special deposit account, not 20%, but 100% of the property of the German Government.

So the money here seized was seized in the name of the Zentraleinkaufs-Gesellschaft, a German corporation or partnership or association—I do not know just what its legal entity was—which was the successor of the Reichs-

einkauf, the purchasing agency of the German government. That is all stipulated and agreed to by all of the parties concerned.

The Alien Property Custodian in his answer has admitted that the plaintiffs filed a claim as required by the statute, have complied with the provisions of the Trading with the Enemy Act in that they must first file a claim before they bring a suit; he has admitted in his answer that he holds more than sufficient funds to satisfy any judgment that might be entered by this Court in this case.

However, in the answer of the Alien Property Custo- 2408
dian, he sets up as an affirmative defense, the fact that a suit has been filed in the Supreme Court of the District of Columbia by one Securities Corporation General to recover $250,000 with interest. That suit went to a final decree.

I should state that that suit was by a bondholder of the German Government who sued the Alien Property Custodian to recover the amount of the bond with interest out of funds of the German Government held by the Alien Property Custodian.

A final decree was entered in that case in favor of the plaintiff, the Securities Corporation General. An appeal was prosecuted by the Attorney General to the Court of 2409
Appeals of the District of Columbia which affirmed the decree of the Trial Court and then the Supreme Court of the United States affirmed the decrees below.

That decree has not yet been satisfied in its entirety for the reason that the funds held by the Alien Property Custodian to the credit of the Imperial German Government are really held in the name of the Zentraleinkaufs-Gesellschaft.

You see the Zentraleinkaufs-Gesellschaft funds are in fact the property of the German Government. The Zentraleinkaufs-Gesellschaft is an agency or instrumentality of the German Government. The Custodian does not hold the funds in the name of the German Government, but holds them in the name of the Zentraleinkaufs-Gesellschaft because these corporations here in New York who

reported the money to the Custodian reported it as belonging to the Zentraleinkaufs-Gesellschaft. He seized other money in the name of the Imperial German Government. That money was exhausted before this decree was completely satisfied, this decree of the Supreme Court of the District of Columbia.

Therefore, I wish to introduce in evidence the final decree of the Supreme Court of the District of Columbia which was filed on June 19, 1924, for $250,000 with interest in favor of the Securities Corporation General and also the decree of the Court of Appeals—

2411 The Court: We have not gotten to the evidence yet. I just want to hear your contentions.

Mr. Rhodes: As I understand it, there was no further evidence to be presented.

The Court: They have not started the trial yet. This is merely their opening.

Mr. Rhodes: All right, your Honor.

I may state that I have collaborated with counsel for the Zentraleinkaufs-Gesellschaft. We are both defendants and we are both trying to protect the fund so far as is right.

I concur in the legal position of Mr. Hays which it is

2412 unnecessary for me to go into.

That is the position of the Government.

The Court: Mr. Rhodes, may I ask a question? As I understood you, the decree in the Securities Corporation General's suit is not yet in final form. Was some appeal pending or something of that kind?

Mr. Rhodes: No, your Honor. The decree in that case was affirmed by the Supreme Court of the United States and the funds held in the name of the German Government by the Alien Property Custodian have been exhausted, but there is still some more due.

The Court: And therefore you may have to resort to this fund?

Mr. Rhodes: My position is that those decrees down there in the Supreme Court of the District of Columbia will have to be satisfied first.

The Court: After the satisfaction of the unpaid balance of that decree out of this particular fund, would there remain enough to satisfy a decree in the case at bar if there is a recovery?

Mr. Rhodes: There may not.

The Court: Manifestly then the Alien Property Custodian and the Treasurer should be taken care of by a proper decree.

Mr. Rhodes: That is my position.

The Court: I suppose there will be no dispute about that?

2414

Mr. Barnes: Of course the Custodian and the Treasurer must not be directed by two Courts to pay out more money than they have. That would not do at all.

I have no doubt that when we come to that point, if your Honor decides that we are entitled to this money, we can settle the matter without any difficulty.

Mr. Rhodes: I just want to introduce this in evidence as a matter of protection. A final accounting may disclose that there is enough to satisfy a decree here.

As I understand it, Section 9A of the Trading with the Enemy Act, as amended on March 4, 1923, 42 Stat. 1511, is the section and the only section under which this suit is brought. That provides that any person not an 2415
enemy or an ally of an enemy may bring a suit in the District Court of the United States for the district in which the plaintiff resides or in the Supreme Court of the District of Columbia against the Alien Property Custodian to recover a debt and that when such a suit is filed, the money shall be held until it is satisfied.

I think under that section the decrees in the District of Columbia have priority. That is the reason I wish to introduce these decrees in evidence.

The Court: You will be afforded the opportunity.

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Prima Facie Proofs.

JOHN S. SORENSON, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination by Mr. Barnes:

Q1. Mr. Sorenson, you are one of the plaintiffs in this action, are you not? A. I am.

Q2. Where do you reside? A. 757 Carroll Street, Brooklyn.

2417 Q3. What is your present business? A. Commission merchant, export and import.

Q4. What is the name of your firm? A. Sorenson & Co., Incorporated.

Q5. In 1914 and 1915, what was your business? A. Same business.

Q6. You were in the same business? A. Commission merchant, export and import.

Q7. Of what firm were you a member at that time? A. Crossman & Sielcken.

Q8. Who were the partners in Crossman & Sielcken? A. Hermann Sielcken, T. S. B. Nielsen and myself.

2418 By the Court:

Q9. Nielsen is the other plaintiff? A. Yes, sir.

By Mr. Barnes:

Q10. Is this paper I show you a photostatic copy of your partnership agreement (handing document to witness)? A. Yes, sir.

Mr. Barnes: I offer it in evidence.

(Marked Plaintiffs' Exhibit No. 1.)

The Court: What is the date of that, Mr. Barnes?

Mr. Barnes: June 2d, 1913.

The Court: Gentlemen, call my attention to any relevant parts of documents as you go along, because I want to have their contents clearly in mind.

Mr. Barnes: The only relevant parts in here are

that all of the capital of the partnership was contributed by Mr. Sielcken, and that the partners should be entitled to the following division of the partnership; to wit, 75 per cent of the net profits to Mr. Sielcken, 12 1/2 per cent to Mr. Sorenson and 12 1/2 per cent to Mr. Nielsen.

There is also the usual provision that the partnership should expire upon the death of the party of the first part, which is Mr. Sielcken, and it should be the duty of the surviving partners to transfer and pay over to the executor of the will of the deceased partner his capital. 2420

The Court: Read that to me in precise terms.

Mr. Barnes (reading): "Upon the death of the party of the first part, it shall be the duty of the surviving partners to transfer and pay over to the Executor of the will of the deceased partner his capital as above defined, and also all the property and business of the firm."

By Mr. Barnes:

Q11. Mr. Sorenson, was Crossman & Sielcken a long established concern? A. Yes, sir, I went with them in March, 1883. 2421

Q12. What was the name of it at that time? A. W. H. Crossman & Brothers, later succeeded by Crossman & Sielcken.

Q13. They were succeeded by Crossman & Sielcken? A. Yes, sir.

Q14. Who were the members of the firm of Crossman & Sielcken? A. George W. Crossman and Hermann Sielcken.

Q15. In 1913, at the time the firm of which you became a member was organized, how large a business were you doing? A. We were doing a very large export business that approximated 6 millions to ten millions a year in exports, and imports of a similar volume. It was a very large business.

Q16. Did you have connections all over the world? A. We did.

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Q17. Did you have facilities for shipping space, etc.? A. As very large shippers for upwards of twenty-five years to all parts of the world, we were at particular advantage with all lines of shipping.

Q18. What was the citizenship of the three partners? A. All Americans.

Q19. Where did they reside?

Mr. Hays: I object, unless you specify the time. That calls for a conclusion.

Q20. Where did you live? Where did you yourself live?
2423 Where was your home? A. The same as today.

Q21. Where was that? A. Brooklyn.

Q22. And where was Mr. Nielsen's home? A. Hackensack, New Jersey.

The Court: What time are you speaking of?

Mr. Barnes: I am speaking of the period from 1913, the time of the organization of the new partnership, on.

Q23. Where was Mr. Sielcken's home?

Mr. Hayes: That I object to as calling for a conclusion. I think the witness should be asked where
2424 Mr. Sielcken was at certain times, whether he had an apartment here, or something like that.

Q24. Where did Mr. Sielcken spend most of his time between 1913, the date of the organization of the firm, and the time that he went to Germany in the summer of 1914? A. In New York.

Q25. Did he have an apartment here? A. For many years and up until the time of his death, he had a suite at the Waldorf Astoria, continuously.

Q26. That is, he had it all the year around? A. Yes, sir.

Q27. He also had a place in Germany? A. Yes.

Q28. A summer home? A. Yes, sir.

Q29. Where was that? A. At Baden-Baden.

Mr. Hays: Did you say a summer home?

Q30. Have you ever been there? A. I have not.

Mr. Barnes: Then I shall strike out the words "summer home."

Q31. He had a residence at Baden-Baden? A. Yes.
Q32. That is, he had a house? A. Yes.
Q33. Do you know where he voted? A. In New York.

Mr. Hays: Wait a moment, I should like to make sure whether that is not hearsay. I do not suppose the witness knows anything about it himself.

The Witness: I was never present when Mr. Sielcken 2426
voted, but he was a resident of New York, and as such I always understood that he voted in New York.

Mr. Hays: I move to strike that out.

By the Court:

Q34. Do you know whether he voted in New York? A. I can not say.

The Court: Then strike it out.

By Mr. Barnes:

Q35. Where was the place of business of Crossman & Sielcken in New York City? A. It was at 90 Wall Street, 2427
from 1913 to 1917.
Q36. Was that your only office? A. Our only office.
Q37. What was the division of activities between you three partners? A. Mr. Sielcken specialized particularly in the coffee affairs of the partnership. Mr. Nielsen handled the import end of our activities. Mine were the exporting business, the accounting and the financing.
Q38. Subsequent to the outbreak of the war between the Central Powers and the Allies in the summer of 1914, Mr. Sorenson, did you receive communications from Hermann Sielcken? A. Yes.
Q39. Where was he at the time the war broke out? A. He was in Germany.
Q40. He was in Germany? A. Yes.
Q41. Were these communications with respect to the

purchase and shipment of food supplies to Baltic ports? A. Yes.

Q42. What form did these communications take?

Mr. Hayes: I object to any communications unless they are connected with the defendant.

The Court: I shall overrule your objection. This is preliminary to something. He has not come to anything definite yet—

A. The communications were sent to us in the form of
2429 letters, cables, radio messages, and by word of mouth through messengers.

Q43. Were these letters and telegrams preserved? A. I do not know whether they were. I did not preserve them.

Q44. As a result of these communications, what did you do with respect to shipping cargoes of food stuffs? A. My partner and myself directed the export departments to select such food stuffs as we thought were wanted, pay for them, engage freight room, ship them, and forward the documents to the consignees that we were directed to consign them to.

Q45. From whom did you receive instructions as to the nature of the cargoes, as to what was to be in the cargoes?
2430 A. From Mr. Sielcken.

Q46. From whom did you receive instructions as to the names of the consignees? A. Mr. Sielcken.

Q47. All in this same way? A. Yes, sir.

Q48. From whom did you receive instructions as to the issuance of the bills of lading? A. Mr. Sielcken.

Q49. And as to the insurance? A. Mr. Sielcken.

Q50. And as to forwarding the papers? A. Mr. Sielcken.

Q51. And as to the forms of the invoices to accompany the documents? A. Mr. Sielcken.

Q52. In other words, all of your instructions with respect to doing this business came in the manner that you have indicated, from Mr. Sielcken? A. Entirely, sir.

Q53. And he was abroad at that time? A. Yes.

Q54. You followed those instructions? A. Yes, sir.

Q55. As to this merchandise that was shipped, by whom was that paid for? A. We paid for it.

Q56. Out of your own money? A. Out of our capital.

Q57. By whom was the freight and the insurance on these cargoes paid? A. In the same manner. We paid for that.

Q58. Did you from time to time receive remittances in New York from abroad covering the invoice value and the freight and the insurance and a 10 per cent commission on these shipments? A. The exact amount each time plus 10%, yes.

2432

Q59. Roughly speaking, about how many shipments in all were made? A. Roughly, 20 to 25 shipments.

Q60. Beginning about what month? A. October, 1914.

Q61. October, 1914? A. Yes, sir.

By the Court:

Q62. 20 to 30 shipments? A. 20 to 25 shipments altogether.

By Mr. Barnes:

Q63. I am correct, am I not, that on the first of these shipments they all went through all right and you received your remittances in due course shortly after the goods arrived? A. Yes.

2433

Q64. Coming down to the shipments made to Harry Levin of Copenhagen, when did those shipments to Harry Levin of Copenhagen begin? A. May I refer to my papers?

Q65. Yes. A. (Witness consults documents) They began at the end of November, 1914.

Q66. Previous to making those shipments at the end of November, 1914, had your firm ever had any business relations or dealings with Harry Levin? A. Never.

Q67. Did you know anything about him? A. No.

Q68. Tell us about how many cargoes were shipped in November, 1914, to Harry Levin? A. Two cargoes.

Q69. And how many in December, 1914 to the same person? A. Two.

Q70. And how many in January, 1915? A. Two.

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Q71. Were these cargoes all shipped in the same manner, that is with respect to forwarding the documents, etc.? A. Yes, exactly the same.

Q72. Did you afterwards receive payment for these cargoes? A. Yes, sir.

Q73. And the amount of payment covered the invoice value and the freight and the insurance and a commission of 10%; is that right? A. Yes, sir.

Q74. Were there some shipments between February 27th, 1915, and April 13th, 1915 made to Harry Levin? A.
2435 Yes, there were.

Q75. How many of those were there? A. There were four shipments not paid for.

Q76. I did not ask you how many were paid for. How many shipments were made? A. Five.

Q77. Five shipments were made? A. Five shipments.

Q78. Were those five shipments intercepted by the British? A. Yes.

Q79. That was your information? A. Yes.

The Court: All of them.

Mr. Barnes: All five were intercepted.

Q80. What were the names of the vessels and the dates
2436 of the sailing of those five shipments? A. March 9th, 1915 the Hilding, $95,578.29. March 11th, 1915 United States, $28,776.73.

Q81. Are those figures which you are giving the invoice figures? A. I am giving you the sailing dates.

Q82. And the invoice values? A. And the invoice values, yes.

Q83. Not the 10% commission? A. No.

Q84. What is the next one? A. March 25th, the Arkansas, $48,686.81.

Q85. And the next one? A. April 1st, the Helig-Olav, $28,105.99. April 15th, the Gunborg, $43,997.16.

Q86. I understand that all five of those boats were intercepted by the British, is that right? A. Yes.

Q87. Were you paid for any of those shipments? A. We were paid for the second one.

Q88. Which one was that? A. The United States which sailed March 11th, plus ten per cent.

Q89. How much were you paid, do you remember? A. $31,654.40.

Q90. When was that paid? A. On the 12th of April in New York.

Q91. 1915? A. 1915.

Q92. And that amount covered the invoice value, freight, insurance, and ten per cent commission? A. Yes.

Q93. But as to the other four vessels you have never been paid? A. Never been paid.

2438

Q94. There were also, were there not, two shipments consigned to Messrs. Beckmann & Jorgensen during this period? A. Yes.

Q95. Previous to those shipments had your firm ever known of Beckmann & Jorgensen, or done any business with them? A. No, sir.

Q96. What were the names of the vessels and the dates of sailing of those two shipments? A. April 27th, Indianic, $53,471.31. April 29th, Oscar II, $83,625.87.

Q97. These two shipments were also intercepted by the British, were they not? A. Yes.

Q98. Were you ever paid anything for those shipments made to Beckmann & Jorgensen? A. We received $8,-

2439

050.44 on the Oscar II shipment.

Q99. Do you know what that payment represented? A. It represented some cereals. We were advised that they were not returned to England, having been landed at Copenhagen.

Q100. What was the total amount of the invoices, freight, insurance and commission on these six shipments, four to Harry Levin and two to Beckmann & Jorgensen, that you have testified to? A. With the commission included?

Q101. Including the commission of 10%? A. $388,-811.98.

By the Court:

Q102. That is the total of all of them? A. Yes.

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By Mr. Barnes:

Q103. And crediting on that the payment on the cereals on the Oscar II of $8,050.44, what is the balance? A. That leaves a balance due of $380,761.54.

Q104. That is the amount of this claim in litigation? A. Yes, sir.

Mr. Barnes: You may examine, Mr. Hays.

Cross Examination by Mr. Hays:

2441

XQ105. Do you know when in 1914, Mr. Sielcken went to Germany? A. Do I know when?

XQ106. When in 1914? A. It was late in May or early in June.

XQ107. He had a home in Germany? A. Yes.

XQ108. Where? A. At Baden-Baden.

XQ109. A large estate? A. I understood it to be a large estate, yes.

XQ110. You never visited there? A. I never did. My partner did.

XQ111. Mr. Sielcken after that was continuously in Germany until his death, was he not? A. He was.

2442 XQ112. You knew, did you not, Mr. Sorenson, that sometime in 1918, there was an arbitration in Germany between the executors of the Sielcken estate and the Zentraleinkaufsgesellschaft referring to the question of the loss on these cargoes? A. Do I know?

XQ113. You knew that, did you not? A. I did not.

XQ114. When did you first hear it? A. I have heard nothing definite in that connection at any time.

XQ115. You have not? A. No, sir.

XQ116. What do you mean by "definite"? Did you hear anything indefinite? A. Details.

XQ117. In general what did you know? When did you first learn about it?

Mr. Barnes: If the Court please, I object to going into this upon cross examination of this witness. This is a part of the defendants' case.

The Court: I shall receive it. Let us get through with it. I am not a jury.

Mr. Barnes: That is quite true. But we contend that the liquidating partners here were never in any way bound by this arbitration agreement entered into in Germany at a time when the two nations were at war undertaking to settle the rights of Crossman & Sielcken over here as against the German Governmental Agency in Germany.

The Court: Practically all that Mr. Hays is asking whether this witness had any knowledge of 2444
it.

XQ118. When did you first have some knowledge, direct or indirect, definite or indefinite? When did you first hear about it? A. I may have heard within the last year.

XQ119. Do you mean to say you did not hear of it in 1919 or 1920? A. I may have heard something in an offhand manner.

XQ120. Let me refresh your recollection. I show you here what purports to be a copy of a letter from Theodor Wille, dated March 23rd, 1920, in which he says, "Of course a serious conflict arose as to whether the intended consignees had to pay or not for those cargoes 2445
which arrived in Copenhagen under the above circumstances. The parties interested came to an agreement that the question should be settled by arbitration, and the result of the arbitration was that the intended consignees were not obliged to pay, not even for those cargoes which had arrived at Copenhagen as above, with the exception of one cargo per S. S. United States which had already been paid for. In this way you will understand that the amounts of your invoices per ships Arkansas, Hellig Olav, Oscar II have also been lost." Do you remember a letter from Mr. Wille in 1920? A. May I ask you to whom that letter is addressed?

XQ121. To Crossman & Sielcken? A. In New York.

XQ122. Yes, and then there is an answer under date of May 21st, 1920, from Crossman & Sielcken, which says: "In this connection we note from your favor of

March 29th that it has been determined by arbitration that there will be no recovery from the eventual buyers for those cargoes which reached Copenhagen on steamers that have been taken into British ports and allowed to proceed to Copenhagen under guaranty to return cargoes to England. Yours very truly, Crossman & Sielcken."

The Court: I shall not admit in evidence what counsel is reading into the record as any proof whatever. All that I permit is that you refer to those documents and see whether they refresh
2447 his recollection.

By the Court:

XQ123. Does that refresh your recollection any— A. No.

Mr. Hays: We stipulated that those letters were interchanged.

By Mr. Hays:

XQ124. Mr. Sorenson, take a look at these letters which counsel stipulated passed at the time. There is one from Wille to Crossman & Sielcken (handing document
2448 to witness). A. My partner handled all of that.

XQ125. Look over those letters and see if they refresh your recollection.

(Discussion.)

Mr. Hays: I withdraw the question.

Mr. Barnes: We stipulated that the letters were interchanged.

XQ126. I am interested to know about it. Do you recall that? A. Yes, the correspondence passed. Nielsen handled it and signed it.

XQ127. You refer to payment having been made on the Steamship United States. Do you know whether or not at the time the payment was made by the Z. E. G. for the goods on the United States which had been seized amounting to some $31,000 that both Mr. Sielcken and the

Z. E. G. thought that those goods would be released? Do you know that? A. I do not know.

~~XQ128. Did you not ever hear that? A. I did not.~~

XQ128. Did you not ever hear of that? A. I did not.

or to Mr. Nielsen's attention in your office? A. It would have come to Mr. Nielsen's attention.

[XQ129. Would that matter have come to your atten

Mr. Barnes: If your Honor please, practically the rest of our evidence is covered by stipulation.

2450

The Court: Is there anything you wanted to mark in evidence?

Mr. Barnes: These papers are written in German with translations attached. I would like to offer them and to read such portions of them as I think will enlighten your Honor unless your Honor prefers to take time and study them at your leisure.

The Court: No. You had better tell me what is in them. If there is any controversy I shall look at them. Are there any that you want marked?

Mr. Barnes: Yes, they will all be marked.

(Discussion.)

Mr. Barnes: Suppose I offer these, and have them marked.

2451

I offer in evidence Annex A to a stipulation filed in this case on June 1st, 1929, together with the translation thereto attached.

(Marked Plaintiffs' Exhibit No. 2.)

Mr. Hays: We do not concede that the translation is accurate in all respects.

Mr. Barnes: That is understood.

Mr. Hays: I understand Mr. Barnes is introducing them as his translations.

Mr. Barnes: The translation there is identical with that which is set up in the defendants' answer as the contract between the parties.

Mr. Hays: We found in the last day or two that

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there were one or two errors in it, and we want to correct them.

Mr. Barnes: I offer in evidence Annex B to the same stipulation, together with the English translation thereto attached.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 3.)

The Court: Have you anything else?

Mr. Barnes: It is further stipulated in this stipu-
2453 lation that in January, 1915, the defendant, Zentral Einkaufs Gesellschaft, m.b.H., took over the business, assets and liabilities of the Reichsenkauf and as such successor became the Purchasing Agency of the Imperial German Government as alleged in paragraph No. 5 of the bill of complaint.

With respect to Plaintiffs' Exhibit No. 2, which has just been offered in evidence, it is stipulated by this same stipulation of June 1st, 1929, that a certain letter signed by the Under Secretary of State of the German Empire, Dr. Richter, bearing date of September 25th, 1914, a copy of which is hereto annexed and made a part hereof as Annex
2454 A, is a true, complete and correct copy of a confirmation of the agreement made by the Reichsenkauf with Crossman & Sielcken as alleged in paragraph No. 7 of the bill of complaint.

The Court: Mr. Hays, that is the same document that is annexed to your answer?

Mr. Hays: Yes, sir.

The Court: Then the effect of this stipulation is to make that a contract?

Mr. Hays: No, I think at the end there is a statement that we stipulate that these are the papers, but we do not stipulate the interpretation of them.

The Court: I understand that, but you stipulate it is an agreement between the parties.

Mr. Hays: I thought you intimated that perhaps I was bound by the translation.

The Court: Oh, no.

(Discussion.)

Mr. Barnes: Now, I offer in evidence Annex C attached to said stipulation together with the English translation thereof.

(Marked Plaintiffs' Exhibit No. 4.)

Mr. Barnes: I now offer in evidence Annex D attached to the same stipulation, together with the English translation thereof.

2456

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 5.)

Mr. Barnes: I now offer in evidence Annex E attached to the same stipulation, together with the English translation also thereto attached.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 6.)

Mr. Barnes: I now offer in evidence Annex F attached to the same stipulation, together with the English translation thereto attached.

The Court: Is there any objection? 2457

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 7.)

Mr. Barnes: I now offer in evidence Annex G attached to the same stipulation, together with the English translation thereto attached.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 8.)

Mr. Barnes: I now offer in evidence Exhibit H attached to the same stipulation, together with the enclosures also attached and the English translation.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 9.)

Mr. Barnes: I also offer in evidence Exhibit 2 from the Memorial for Claim of the United States

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against Germany and Z.E.G., Docket No. 8305, together with a translation thereof.

The Court: Memorial by whom?

Mr. Barnes: Memorial by the United States of America and Crossman & Sielcken against Germany and Z.E.G.

The Court: Before the Mixed Claims Commission?

Mr. Barnes: Yes.

The Court: Is there any objection?

2459 Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 10.)

Mr. Barnes: Does your Honor want me to read from these exhibits at this time?

The Court: You can suit yourself about that.

Mr. Barnes: I think I should like to read from them now.

(Mr. Barnes then read Plaintiffs' Exhibits 2 to 10, inclusive, to the Court.)

Mr. Barnes: I shall now read into the record a stipulation which has been entered into between the parties, dated December 20th, 1929:

2460 "It Is Hereby Stipulated and Agreed, by and between the plaintiffs and the defendant, Zentral Einkaufsgesellschaft, m.b.H., by their respective attorneys, as follows:

1. That shipments of merchandise consisting of pure lard, fatbacks, clear backs, near backs, short backs, cakes and cereals were made by the firm of Crossman & Sielcken, pursuant to the written notification dated September 25, 1914, marked Exhibit A and annexed to the answer of the defendant, Zentral-Einkaufsgesellschaft, m.b.H., from New York, on the vessels, on the dates and to the consignees stated below. Defendant, Zentral-Einkaufsgesellschaft, m.b.H., does not hereby stipulate that the translation of Exhibit A is accurate:

Vessel	Date of Sailing	Consignee
Hilding	February 27, 1915	Harry Levin, Copenhagen
Arkansas	March 23, 1915	Harry Levin, Copenhagen
Hellig Olav	March 30, 1915	Harry Levin, Copenhagen
Gunborg	April 13, 1915	Harry Levin, Copenhagen
Indianic	April 23, 1915	Beckmann & Jorgensen, Copenhagen 2462
Oscar II	April 28, 1915	Beckmann & Jorgensen, Copenhagen

2. That the invoice value, including freight and insurance upon the said merchandise so shipped and the amount of the commission, computed at 10%, and the total of such value plus commission, are as follows:

Vessel	Invoice Value	Commission	Total 2463
Hilding	$95,578.29	$9,557.83	$105,136.12
Arkansas	48,686.81	4,868.68	53,555.49
Hellig Olav	28,105.99	2,810.60	30,916.59
Gunborg	43,997.16	4,399.72	48,396.88
Indianic	53,471.31	5,347.13	58,818.44
Oscar II	83,625.87	8,362.59	91,988.46

3. That as to three of said shipments, the Arkansas, Hellig Olav and Oscar II, the respective vessels carrying the same were stopped on the high seas by the British Naval Authorities and were permitted to proceed to Copenhagen only on condition that the owners of said respective vessels agreed to forward to England the said shipments to be there proceeded against in the Prize Court as contraband. The respective vessels carrying such merchandise thereupon proceeded to Copen-

hagen but refused delivery thereof to the respective consignees, except as to certain crackers and cereals on the SS. Oscar II, and forwarded said shipments to England where they were proceeded against in the British Prize Court, condemned as contraband of war, and sold, and the proceeds thereof appropriated by the British Government. The respective dates of the arrival of said vessels in Copenhagen are as follows:

2465

Vessels	Arrived in Copenhagen
Arkansas	April 17, 1915
Hellig Olav	April 17, 1915
Oscar II	May 11, 1915

4. That as to the remaining three of said shipments, to wit, those on the said SS. Hilding, SS. Gunborg and SS. Indianic, the vessels carrying the same did not reach Copenhagen, but were detained on the high seas by the British Naval authorities and taken direct to a British port and proceeded against and condemned in the British Prize Court as contraband of war and sold and the proceeds
2466 thereof appropriated by the British Government. The normal duration of voyage of said three vessels from New York to Copenhagen would be twenty days.

5. That bills of lading covering such shipments were taken out by Crossman & Sielcken in the names of the consignees Harry Levin and Beckmann & Jorgensen, respectively, as above specified. That annexed hereto are the bills of lading, invoices and insurance certificates, or copies thereof, covering the shipments above specified. These were immediately forwarded by mail to the respective consignees. Just what was done by the consignees or defendant Z.E.G. with these original papers after learning of the seizures heretofore

described is not known, and no point is made by either party that any legal result shall be ascribed to the retention of or the return of the said documents by said consignees and the defendant Z.E.G.

6. That the books of original entry of the firm of Crossmann & Sielcken show that the said firm of Crossmann & Sielcken have received no payment on account of the said invoice value or commissions on any of said merchandise except only the sum of $8,050.44 for certain crackers and cereals released from the said merchandise carried on said 2468
SS. Oscar II, and that the total of said invoice value and commissions remaining unpaid if due is the amount of $380,761.54, exclusive of interest.

7. That a shipment of similar merchandise was made by the firm of Crossmann & Sielcken, on the SS. United States, sailing from New York March 9, 1915, consigned to Harry Levin, Copenhagen, of which the invoice value, including freight and insurance and commission computed at 10% amounted to the sum of $31,654.40; that copies of the bill of lading, insurance certificate and invoice are hereto annexed; that said vessel was stopped on the high 2469
seas by the British Naval authorities and was permitted to proceed to Copenhagen only on condition that the owner of said vessel agreed to forward to England the said shipment, to be there proceeded against as contraband. Said vessel thereupon proceeded to Copenhagen, arriving there on March 27, 1915, but refused delivery of said shipment to the consignee, and forwarded said shipment to England, where it was proceeded against in the British Prize Court, condemned as contraband of war, and sold, and the proceeds thereof appropriated by the British Government. On April 12, 1915, the defendant Z.E.G. paid Crossmann & Sielcken the sum of $31,654.40, being the invoice value, including freight and insurance, and

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10% commission on said seizure both parties agreed that the merchandise should remain in Scandinavia and be sold there, and that at the time of such payment both parties expected that the merchandise would be released, and that Z.E.G., after the release thereof could not be obtained, made a demand that said payment be returned.

8. That Hermann Sielcken was at all times between the dates hereinbefore mentioned an American citizen.

2471 Mr. Barnes: I now offer in evidence one of the bills of lading covering the shipment on the Hilding from Crossmann & Sielcken consigned to Harry Levin of Copenhagen. The date of the bill is the 27th of February, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 11.)

Mr. Barnes: There are four other bills of lading covering the same shipments made out in the same manner to the same consignee, and bearing the same date.

2472 The Court: Covering the same shipments?

Mr. Barnes: Shipments of different goods on the same boat.

I also offer in evidence a copy of the insurance certificate covering the merchandise shipped on the Steamship Hilding.

The Court: Any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 12.)

Mr. Barnes: There were three other insurance certificates in other companies of substantially the same form covering war risk, and also an insurance certificate covering marine risk.

The Court: Do you want to offer those in evidence?

Mr. Barnes: We shall put in one and stipulate

the others. There is no point made that we did not adequately insure the cargoes.

(Discussion.)

Mr. Barnes: It is stipulated that the insurance certificates which were forwarded with the bills of lading and the invoices were endorsed in blank by Crossmann & Sielcken to whom they originally ran.

Mr. Hays: As to the bills of lading and the insurance certificates which have not been put in evidence, it is stipulated that all of the bills of 2474
lading contain the affidavit of Sorenson which appears on the one in evidence and also contain the printed statement below the affidavit which appears on the bill of lading in evidence, and that all the insurance certificates are substantially the same as the one introduced in evidence, and that all of them contain the endorsement, "Warranted no German, Austrian, Russian or Turkish ownership, interest, consignee or destination."

Mr. Barnes: I also offer in evidence a photostatic copy of the invoice accompanying the shipment on the Hillding, dated February 27.

The Court: Is there any objection? 2475

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 13.)

Mr. Barnes: I now offer in evidence one of the two bills of lading covering the shipment on the Steamship Arkansas consigned to Harry Levin.

The Court: Any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 14.)

Mr. Barnes: There is another bill of lading covering other packages of this same shipment which is in the same form as the one offered in evidence, and contains an affidavit by Mr. Sorenson that the goods are the property of an American concern.

Mr. Hays: And also the same stamp.

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Mr. Barnes: It is in exactly the same form as the other.

I offer in evidence an insurance certificate covering this shipment on the Steamship Arkansas which appears to be an original, and endorsed on the back by Crossmann & Sielcken.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 15.)

Mr. Barnes: There was also an insurance cer-
2477 tificate covering marine insurance which I shall not put in. That was also endorsed by Crossmann & Sielcken.

I now offer in evidence the invoice covering the shipment to Harry Levin on the Arkansas dated March 23rd, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 16.)

Mr. Barnes: I offer in evidence a copy of the bill of lading covering the shipment to Harry Levin on the Steamship Heligoland.

The Court: Is there any objection?

2478 Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 17.)

Mr. Barnes: I also offer in evidence what appears to be an original certificate of insurance on said shipment in favor of Crossmann & Sielcken, dated April 1st, 1915, and endorsed in blank by Crossman & Sielcken on the back.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 18.)

Mr. Barnes: There was also a certificate for marine insurance on the said boat which it is not necessary to put in evidence, that also being endorsed in blank.

I offer in evidence a copy of the invoice on the Heligoland on the consignment to Harry Levin, dated March 30th, 1915.

(Marked Plaintiffs' Exhibit No. 19.)

Mr. Barnes: I now offer in evidence one of the bills of lading covering the shipment on the Steamship Gunborg consigned to Harry Levin, dated April 12th, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 20.)

Mr. Hays: It is stipulated that the other bills of lading for shipment on the same steamer are in the same form. 2480

Mr. Barnes: There were two other bills of lading for shipment on the same steamer, in the same form.

I now offer in evidence a copy of a certificate of insurance covering war risk on said shipment, made out to Crossmann & Sielcken. It is understood that the original thereof was endorsed in blank and forwarded with the papers.

Mr. Hays: That is agreed to.

Mr. Barnes: There is a stamp of warranty that there is no German or Austrian interest.

(Marked Plaintiffs' Exhibit No. 21.)

Mr. Barnes: There was also another certificate 2481 for war risk insurance taken out in another company in substantially the same form, and with the same warranty of no German or Austrian interest in the goods.

I also offer in evidence a copy of the invoice of the shipment on the Gunborg to Harry Levin, dated April 13, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 22.)

Mr. Barnes: I offer in evidence a copy of one of the bills of lading covering the shipment on the Steamship Indianic, consigned to Messrs. Beckmann & Jorgensen and dated April 23rd, 1915.

The Court: Is there any objection?

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Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 23.)

Mr. Barnes: There were three other bills of lading issued in connection with the same shipment, all of which are in the same form.

I offer in evidence a copy of a certificate of insurance covering war risk on the same shipment. It is stipulated that the original of the same was endorsed by Crossman & Sielcken and forwarded with the other papers.

2483 (Marked Plaintiffs' Exhibit No. 24.)

Mr. Barnes: There was also another certificate of war risk insurance covering the same shipment with the same clauses in it regarding the warranty of no German or Austrian interest, which it is not necessary to put in evidence.

I also offer in evidence a copy of the invoice of the shipment from Crossmann & Sielcken to Messrs. Beckmann & Jorgensen, April 23rd, 1915. This invoice is somewhat different from the others in that it provides "For account and risk of Messrs. Beckmann & Jorgensen," whereas the others said for the account and risk of Messrs. Crossmann &

2484 Sielcken.

(Marked Plaintiffs' Exhibit No. 25.)

Mr. Barnes: I offer in evidence a copy of one of the bills of lading covering the shipment on the Oscar II from Crossmann & Sielcken to Messrs. Beckmann & Jorgensen, dated April 2nd, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 26.)

Mr. Barnes: There were also two other bills of lading in similar form covering the same shipment made out in the same manner.

I offer in evidence a copy of certificate of war risk insurance covering said shipment on the Oscar II. It is stipulated that the original was endorsed

in blank by Crossmann & Sielcken and forwarded with the other papers.

(Marked Plaintiffs' Exhibit No. 27.)

Mr. Barnes: There were also two other certificates of insuranee covering war risk in the same form on the same shipment.

I offer in evidence a copy of the invoice from Crossmann & Sielcken to Messrs. Beckmann & Jorgensen covering the shipment on the Oscar II.

The Court: Is there any objection?

Mr. Hays: No objection. 2486

(Marked Plaintiffs' Exhibit No. 28.)

Mr. Barnes: Now, I offer in evidence a copy of the bill of lading of the shipment on the Steamship United States from Crossmann & Sielcken to Harry Levin, dated March 9th, 1915.

Mr. Hays: I object to that on the ground that it is incompetent, irrelevant and immaterial. That is not one of the shipments involved in this case.

Mr. Barnes: This is a shipment that was made under this same arrangement. It was seized by the British, but was actually paid for by the defendant Z.E.G., after its seizure by the British.

We offer this for the purpose of showing that 2487 the documents and everything in connection with it were identical with those of the shipments which they refused to pay for.

Mr. Hays: It is stipulated between us that at the time these goods were paid for it was expected by both Crossmann & Sielcken and by the Z.E.G. that the goods would be released. Therefore, they were paid for.

When the goods were not paid for, the Z.E.G. made a claim against Crossmann & Sielcken.

If that is so, how is this material?

The Court: I shall receive it. I shall not be misled by it.

(Marked Plaintiffs' Exhibit No. 29.)

Mr. Barnes: I also offer in evidence in connec-

tion with this same shipment on the Steamship United States a copy of a certificate of insurance covering war risk.

The Court: It will be received under the same conditions.

(Marked Plaintiffs' Exhibit No. 30.)

Mr. Hays: I should like to have my objection noted on the record, your Honor. I object to all these documents referring to the S. S. United States on the ground that they are irrelevant and immaterial, and not within the issues of this case.

2489

The Court: Objection overruled. You may have your exception. I shall state on the record that in receiving them I do not pass on their effect.

Mr. Rhodes: I should like to note on the record the same objection.

The Court: All right, and you may have an exception.

Mr. Barnes: I offer in evidence a copy of the invoice of the shipment on the Steamship United States to Harry Levin, dated March 9th, 1915.

Mr. Hays: The same objection.

The Court: The same ruling, and you may

2490

have an exception.

(Marked Plaintiffs' Exhibit No. 31.)

Mr. Barnes: It is stipulated that the books of original entry of the firm of Crossmann & Sielcken show that the amount remaining unpaid, if due, on these transactions is the sum of $380,761.54, exclusive of interest, which is the amount Mr. Sorenson testified to.

And it is stipulated with respect to the circumstances of the seizure of the Steamship United States that it arrived in Copenhagen on March 27th, 1915, but that the vessel refused delivery of the shipment to the consignee, and forwarded the shipment to England where it was proceeded against in the British Prize Court and condemned as contraband of war and sold. It arrived on

March 27th, 1915. It was sent to England, and there it was sold.

On April 12th, 1915, the defendant, Z.E.G. paid Crossmann & Sielcken the sum of $31,654.40, being the invoice value, including freight and insurance, and ten per cent commission on said shipment. It is stipulated and agreed, however, that after said seizure both parties agreed that the merchandise should remain in Scandinavia and be sold there, and that at the time of such payment both parties expected that the merchandise would be released, and that Z.E.G., after the release thereof could not be obtained, made a demand that said payment be returned. 2492

That is put in as a qualification of any legal inferences which we might argue should be drawn from the fact that they did pay for this shipment.

May the stipulation which I have read be marked in evidence?

(Marked Plaintiffs' Exhibit No. 32.)

Mr. Barnes: I wish to offer in evidence the Memorial for Claim of the United States of America on behalf of the Columbia Trust Company as executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorlief S. B. Nielsen, surviving partners of the firm of Crossmann & Sielcken against Germany and Zentraleinkaufs-Gesellschaft, m.b.H., being Docket No. 8305, together with the answer of the German answer thereto. 2493

Mr. Hays: I object to that as irrelevant and immaterial. Obviously the claim must be a self-serving declaration. It cannot be evidence in any case. If Mr. Barnes means that there are admissions in the answer and he will need those admissions to prove some of his facts, I might not insist on objecting.

Mr. Barnes: I shall read the paragraphs in the claims.

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The Court: We shall mark the papers separately.

Mr. Rhodes: I object to them also, your Honor.

The Court: I shall not pass on the effect of them, but I shall allow them to go in evidence.

Mr. Hays: Exception.

Mr. Rhodes: Exception.

(Marked Plaintiffs' Exhibits Nos. 33 and 34.)

(Mr. Barnes read Plaintiffs' Exhibits Nos. 33 and 34 to the Court.)

2495 Mr. Barnes: I understand that Mr. Hays and the Government admit that the notice of claim was properly filed on behalf of the plaintiffs, as provided for in the Trading With the Enemy Act.

Mr. Rhodes: I contend that the Memorial and answer are immaterial, incompetent and irrelevant, and I object to them.

The Court: I shall overrule your objection, and you may have an exception.

Mr. Barnes: Plaintiff rests.

(Prima facie proofs closed.)

Mr. Hays: Defendant Z.E.G. moves to dismiss the plaintiffs' case on the ground that the plaintiff has not made out a cause of action.

2496 The Court: Overruled.

Mr. Hays: Exception.

Defendants' Proofs.

Mr. Rhodes: Your Honor, I wish to introduce in evidence the final decree of the Supreme Court of the District of Columbia in the case of Securities Corporation General vs. Frank White, Treasurer of the United States, and Thomas W. Miller, Alien Property Custodian, Equity No. 41-153, filed on June 19th, 1924.

Mr. Barnes: I object to its admission in evidence upon the ground that it appears on the face of the

decree that the decree in question is against funds and property of the Imperial German Government held by the Alien Property Custodian and the Treasurer as property of the Imperial German Government, and not in any way held as property of the defendant Z.E.G.

The Court: Objection overruled. You may have an exception. I shall admit it as Exhibit A. I shall not pass on the effect of it now.

(Marked Defendants' Exhibit A.)

2498 Mr. Rhodes: I wish to introduce in evidence a copy of the mandate of the Supreme Court of the United States, Case No. 425, confirming said decree of the Supreme Court of the District of Columbia, and which incorporates a copy of the decree of the Court of Appeals of the District of Columbia. That was filed on December 17th, 1925.

Mr. Barnes: We note the same objection.

The Court: Same ruling.

Mr. Barnes: Exception.

(Marked Defendants' Exhibit B.)

2499 Mr. Rhodes: I also offer in evidence a copy of the mandate of the Court of Appeals of the District of Columbia in the same case, which was filed in the Supreme Court of the District of Columbia on March 21st, 1925.

Mr. Barnes: We note the same objection.

The Court: Same ruling.

Mr. Barnes: Exception.

(Marked Defendants' Exhibit C.)

Mr. Rhodes: Your Honor, I wish to move that the bill of complaint be dismissed for the reason that the agreement on which these transactions are based shows clearly that the purchasing agency of the German Government had no authority to buy, except on the condition that title would pass upon delivery at a Baltic seaport. The subsequent correspondence confirms that.

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One document here dated March 22nd, 1915, refers to the fact that even prior to the time when this affidavit was put on these bills of lading to the effect that the goods were the property of Sorenson & Nielsen, the goods were the property of Crossmann & Sielcken.

It was the understanding between the parties all along that the goods were the property of Crossmann & Sielcken until there was a delivery at a Baltic seaport.

2501 There is no evidence introduced here to show that the party who made the agreement on behalf of the German Government or the Reichseinkauf, the purchasing agency of the German Government, had authority to make such a contract.

The contract itself says that he is commissioned to receive in Baltic seaports, not to purchase in New York, but to receive in Baltic seaports.

I believe that the evidence in this case supports and confirms the fact that the title to these goods did not pass, and there was no understanding that it should pass until there was an actual

2502 delivery at a Baltic seaport.

There being no delivery at a Baltic seaport, the title never passed.

Consequently, there is no liability on the part of the Zentral Einkaufs-Gesellschaft as successor to the original contractor, the Reichseinkauf.

I move that the bill of complaint be dismissed because of the insufficiency of the evidence.

The Court: Motion denied. You may have your exception.

Proceed.

Mr. Hays: I should like to call Mr. Burchard.

ARTHUR BURCHARD, called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct Examination by Mr. Hays:

Q1. Dr. Burchard, you reside in the City of New York? A. Yes.

Q2. How long have you lived here? A. Since 1915.

Q3. Are you a member of the German Bar? A. Yes, sir.

Q4. For how long have you been a member of the German Bar? A. Since 1900. 2504

Q5. You were born in Germany? A. Yes, sir.

Q6. You received your education in Germany? A. Yes, sir.

Q7. And are familiar with both the German and the English language? A. Yes.

Q8. I show you Plaintiffs' Exhibit 2, together with the English translation attached thereto. I am interested in the question of the translation down to the word abzunehmen. Would you mind translating the German into English down to the word Abzunehmen. A. (Translating): "Agreement, Berlin, W. H., September 25th, 1914. I herewith confirm to you that the Reichseinkauf" 2505 —there is something said in here in parenthesis which seems to be put in by the translator, the translation of what Reichseinkauf means in English, but of course it is the name of a firm. It means Imperial or Government purchasers. (Continuing) —"in Hamburg, has been commissioned"—they say here "to receive." It is a technical term of German law.

Q9. What does abzunehmen mean? A. Abzunehmen means in German law the act of the buyer whenever the goods have been sold to him, that he is to take them in his possession and to take them away as to deliver now. That is much more than the word "receive."

Mr. Barnes: I move to strike out "that is much more than the word 'receive.'"

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Q10. According to your translation "abzunehmen" instead of meaning to receive would mean to take delivery of the actual goods? A. Yes, that is the real meaning of it. It is a small change, but it clears up the meaning. I will tell you what it is—

Mr. Barnes: If the Court please, I object to this witness telling us the meaning of the contract.

The Witness: I beg your pardon, I am not going to talk about the meaning of the contract. I am only going
2507 to talk about the translation.

Mr. Barnes: I have no objection to the witness who is properly qualified translating a contract from German into English. I do object to his telling the Court and telling us what the contract means.

The Court: The Court will pay no attention to his evidence, if he does.

The Witness: I am just going to translate: "—is commissioned to take delivery of mixed cargoes of wheat, tea, cocoa, concentrated feed, meat conserves, up to the value of about 600,000 marks for each ship's cargo which are
2508 shipped on neutral ships from American ports to neutral ports of the Baltic Sea, in the port of the Baltic Sea."

Mr. Hays: That is all, Doctor.

Cross Examination by Mr. Alger:

XQ11. What is the English word which you say should be substituted in place of the word "receive"? A. There is actually no exact English word that entirely complies with the German word because "abzunehmen" is a technical term. If you take the nearest approach in English you could only say, "to take something which has been given to you to take it."

XQ12. To take? A. To accept something which has been given to you for the purpose of delivering it. That is the only thing.

XQ13. The word "receive" in English also indicates the same thing, does it not? A. "Receive" is something entirely colorless. Anything that you get in some way is what you receive. But "abzunehmen" means something very definite. If you see the word "abzunehmen" in German, it is a technical term, and you know exactly what it means.

XQ14. It is a technical term which is customarily used in c. i. f. contracts in Germany, is it not? A. "Abzunehmen" is used—

XQ15. I asked you whether the word is not customarily used in c. i. f. contracts in Germany? A. Yes, because "abzunehmen" is a technical term of the German law of Contract of Sale and Purchase. Since this is a contract of sale and purchase, it must be used there too. That is understood. 2510

XQ16. Do you claim that this translation of that word "abzunehmen" into "receiver" is incorrect or insufficient? A. It is insufficient.

XQ17. You know, however, that in a German-English dictionary the word "to receive" is given as an English equivalent for "abzunehmen," do you not? A. The dictionaries do not give technical legal terms.

XQ18. The dictionary may be wrong. A. It is not a question of being wrong. The purpose of a dictionary is not to give a translation. 2511

XQ19. Excuse me. I have asked you a question, and I shall ask you to reply. That is the English equivalent given in the German dictionary for "abzunehmen," is it not? A. It is not, for this purpose.

XQ20. But for some purpose—

By the Court:

Q21. You are only asked whether the dictionaries say that? A. Some dictionaries may do it. Of course, there are some dictionaries that say that.

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Re-direct Examination by Mr. Hays:

RDQ22. What is the German word which means "to receive" when it is used in a colorless sense? A. "Empfangen."

Mr. Hays: I now introduce in evidence, your Honor, the deposition of Dr. Walter Frisch, taken in Berlin.

Mr. Barnes: If your Honor please, we shall have objections to some of the answers as they
2513 are made. I suggest possibly that somebody could take the stand as a witness and the questions could be asked, and the answers could be made, and then we could make our objections.

Mr. Hays: Suppose I read the questions and Mr. Abramson gives the answers.

"Deposition of DR. WALTER FRISCH, taken in Berlin, at the head office of the Dresdner Bank, Behrenstrasse 35-39, on October 15th, 1929, pursuant to the stipulation
2514 dated September 17, 1929, signed by Barnes, Avery & Whiting, attorneys for plaintiffs and by Arthur Garfield Hays, as attorney for defendants, Zentraleinkaufs-Gesellschaft.

"Appearances: William Abramson, attorney for Z. E. G. defendant, and Brainard Avery and George W. Alger, attorneys for plaintiffs.

"It is stipulated that objections to questions as to form shall be made at this time; all other objections shall be disposed of as provided in the aforesaid stipulation of September 17, 1929.

"By Mr. Abramson:

"Q. Where is your domicile? A. Berlin-Charlottenburg, Sophienstr. 32.

"Q. What is your occupation? A. I am a member of the directorate of the Dresdner Bank. (Vorstandsmitglied der Dresdner Bank.)

"Q. In September, 1914, were you connected with the Reichseinkauf? A. Yes, I was—at that time a Commissioner of the Department of the Interior, at Berlin, and at the office of the Hamburg-American Line, at Hamburg, the office of Mr. Ballin.

"Q. At that time—September, 1914, were you connected with the German Government? A. Yes, I was an official of the German Imperial Government. 2516

"Q. At that time you had also some connection with the Reichseinkauf? A. Yes.

"Q. Was your position that of a manager? A. At that time not.

"Q. How long did your connection with the Reichseinkauf continue? A. It was continued until the Z. E. G. was founded.

"Q. In other words, you continued to represent that organization? A. I was, during the war an Imperial official, and as such I had to protect the interests of the Empire. I became a manager of the Zentraleinkaufs-Gesellschaft, but I continued at the same time to be a Government official. I was a manager of the Z. E. G. 2517

"Q. Did the purchase of goods by the Reichseinkauf come under your jurisdiction? A. Yes. The offers had to be submitted to me for my approval, and in addition, I was entitled to make purchases myself.

"Q. Did you know Hermann Sielcken? A. I made his acquaintance through Mr. Ballin as far as I remember in September, 1914.

"Q. Prior to September 24th, 1914, did you have any conversation with Mr. Sielcken with reference to the shipment of mixed cargoes of food stuffs, by Crossman & Sielcken to Baltic ports? A. Yes. I had such conversations with Mr. Sielcken prior to September 24, 1914, but do not know what date.

"Q. Where did the conversation take place? A. The conversation took place in the office of Mr. Ballin at Hamburg.

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"Q. Who were present? A. I think only Mr. Ballin, I and Mr. Sielcken.

"Q. Are you now able to state the exact conversation and what was said by Mr. Sielcken, Mr. Ballin and yourself? A. Yes. But I must add that this conversation took place at Mr. Ballin's office and also during a luncheon in a restaurant, as far as I remember, where other persons were present.

"Q. As I understand it, there were more than one conversation with Mr. Sielcken with reference to these
2519 shipments. A. Yes, there were more conversations.

"Q. They took place at about the same time. A. That I cannot remember.

"Q. What I want to know is, they took place within a few days? A. Yes.

"Q. I ask you again, are you now able to state the exact words said by Mr. Sielcken, Mr. Ballin and yourself? A. No, it is too long ago. I cannot remember the exact conversation.

"Q. Have you any memorandum from which you can refresh your recollection as to the substance of the conversation? A. Yes.

2520 "Q. Is this memorandum which I show you, the memorandum referred to by you?"

Mr. Barnes: If the Court please, at this point I wish to make an objection on the ground that the witness was shown a memorandum without his memory having been exhausted as to whether or not he could remember the substance of the conversation.

The Court: I shall overrule your objection to this question. I do not know what is going to happen.

Mr. Barnes: He says, "Is this memorandum which I show you, the memorandum referred to by you?"

The Court: I shall overrule your objection. You may have an exception.

Mr. Hays (continuing):

"A. I believe this is only a copy, but I think I can remember positively that I have drawn a report for his Excellency Mr. Richter dealing with the transactions with Crossman & Sielcken.

"By Mr. Abramson: I hand this paper to the stenographer, and ask to have it marked for identification.

"The paper is marked by the stenographer as Defendants' Exhibit A for identification. 2522

"Q. Dr. Frisch, where is the original of the Defendants' Exhibit A for identification? A. I cannot tell where the original is. I presume it forms part of the files of the Department of the Interior. (Reichsamt des Innern)."

Mr. Barnes: I move to strike out that portion of the answer which says, "I presume it forms part of the files of the Department of the Interior."

The Court: Overruled. You may have your exception. 2523

Mr. Hays (continuing):

"Q. When did you last see the original? A. At the moment when I dispatched it.

"Q. Which was when, do you remember? A. I think it was the date of the report.

"Q. Did you make any efforts to find the original report? A. No.

"Q. Have you, during the last few days done anything to locate the original report? A. I had a conversation about it with Dr. Israel, and I asked Mr. Israel to trace it, so that I might compare the copy with the original and identify my signature.

"Q. Did Dr. Israel report to you that he was able to find the original? A. No. He informed me that so far he had not been able to trace the original.

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"Q. Do you know if the Exhibit A from the defendants is a copy of the original report, to the best of your recollection? A. I have every reason to suppose that it is a copy of the original, to the best of my recollection."

Mr. Barnes: I move to strike that answer out upon the ground that it is not responsive to the question.

The Court: Overruled.

Mr. Barnes: Exception.

2525 Mr. Hays (continuing):

"Q. Was this report or memorandum the Defendants' Exhibit A, made before or after your talks with Mr. Sielcken? A. The report must have been made after the conversation with Mr. Sielcken."

Mr. Barnes: I also move to strike that out upon the ground that it is not responsive to the question.

The Court: It does not amount to anything. I shall attach no significance to it.

2526 Mr. Hays (continuing):

"Q. Dr. Frisch, does this report, Defendant's Exhibit A, refresh your recollection as to the substance of your conversation with Mr. Sielcken? A. Yes.

"Q. Refreshing your recollection from the report, Defendant's Exhibit A, can you state the substance of your first conversation with Mr. Sielcken, what he said and what you said, as near as you recollect it."

Mr. Barnes: I object to that upon the ground that no proper basis was laid for permitting the witness to refresh his recollection by looking at this document, inasmuch as his recollection had not been exhausted as to the substance of the conversation before the memorandum was shown to him.

Mr. Hays: I had supposed, your Honor, that a

witness could refresh his recollection with anything.

The Court: So he can, if there is any occasion. All you have asked him to state was the exact language of a conversation. You have not laid the basis for using a memorandum yet, have you?

Mr. Hays: I think your Honor ought not to be technical about it, but ought to be liberal.

The Court: I am not a jury. I shall hear this and see what I shall do with it.

Mr. Barnes: I understand your Honor is not 2528
a jury. I know if you are satisfied after you have examined the deposition carefully that the evidence is not competent it will not make any difference to you.

The Court: If you have not made the memorandum itself competent, and you do no more than read the memorandum into the record, I shall not consider it.

There is a rule of evidence about using a memorandum. You have got to go pretty far before you can put in evidence a memorandum.

(Discussion.) 2529

Mr. Hays (continuing):

"Q. Refreshing your recollection from the report, Defendants' Exhibit A, can you state the substance of your first conversation with Mr. Sielcken, what he said and what you said, as near as you recollect it? A. I stated before that there were several conversations at different places and at this distance of time it is impossible to give the exact words of the conversations.

"Q. I am not asking you for the exact conversation, but I want to know, does the Defendants' Exhibit A refresh your recollection as to the substance of your first conversation with Mr. Sielcken with reference to the shipments of foodstuffs to Baltic seaports? A. Yes. It has.

"Q. Will you state the substance of your first con-

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versation with Mr. Sielcken and also state when and where it was held? A. The question was put to Mr. Sielcken, whether he would undertake to ship mixed cargoes of foodstuffs of various kinds to Baltic ports, when the war risk was borne by him and what he would charge for it.

"Q. Who put the question? A. I don't remember, either Mr. Ballin or myself.

"Q. What was Mr. Sielcken's answer? A. Mr. Sielcken considered the matter, and after some time, perhaps
2531 on this occasion, perhaps on another occasion, he agreed to ship the cargoes to Baltic ports, and to inform his partners in America. I wish to add that it is likely that there have been other conversations about this matter when I was not present between Mr. Ballin and Sielcken, and that it is possible that Mr. Ballin wrote or telegraphed Excellency Richter, so that I got the knowledge afterwards."

The Court: Do you consider any of that competent?

Mr. Hays: The only thing I consider competent is what he said was the conversation with Sielcken.
2532 There is a direct question on that, your Honor.

(Discussion.)

Mr. Hays (continuing):

"Q. Do you recall any other conversations with Mr. Sielcken other than the one you have just testified to, referring to the same subject? A. It is too long ago. I think I spoke with him several times, but I cannot say.

"Q. Did you speak to Mr. Sielcken after he had consulted with his partners in New York? A. I believe Mr. Sielcken concluded the transaction without having consulted his partners previously.

"Q. On what do you base that belief? A. Because he told me that he was going to inform his partners of the transaction.

"Q. Mr. Frisch, when was the conversation, to which you have testified, held? A. As far as I remember, it must have taken place before I made the report for his Excellency Richter.

"Q. Where was it held? A. I think at the head office of the Hamburg American Line.

"Q. At what place? A. Hamburg, Alsterdamm.

"Q. You stated, Dr. Frisch, that Mr. Sielcken considered the matter, will you state what Mr. Sielcken said at this conversation? A. I cannot remember the exact words, the chief point was that Mr. Sielcken was to bear 2534
the war risk, and that of course he had to consider it. For us, we had the great interest, because up to this point in other business transactions we had not succeeded in covering the full war risk. I may add that we knew Mr. Sielcken to be a great pro-German and that consequently we hoped that we should conclude the transaction with him.

"Q. What did Mr. Sielcken finally say about assuming the war risk? A. He said that he would undertake it for a reasonable commission.

"Q. Was the commission mentioned? A. Yes. I think in the report to Excellency Richter it is said that the 2535
commission is to be 10 per cent of the value; and it was said that the commission is reasonable in comparison with the danger.

"Q. You stated, Dr. Frisch, you could not conclude other business transactions: Did you refer to other business transactions with Crossman & Sielcken? A. No, I think it was the only business transaction with Crossman & Sielcken. We tried to make other business with other firms; especially I remember we tried to get from American mills to Swedish ports, and in this case we could not cover the full war risk.

"Q. After your talks with Mr. Sielcken, which you testified to, did you prepare a letter or document to be sent to Mr. Sielcken? A. My report, was accompanied by a draft of a letter to Mr. Sielcken confirming the transaction to him. As far as I remember Mr. Richter

has undersigned this and sent this to Crossman & Sielcken in care of Mr. Sieleken in Hamburg.

"Q. Is this a copy of the document, or letter, referred to by you? A. Yes, I think so.

"Mr. Abramson: I ask to have this marked Defendant's Exhibit B for identification.

"I offer Defendants' Exhibit A for identification in evidence subject to translation.

"Mr. Alger: I object, and will object at the trial to the receipt of this instrument in evidence,
2537 as incompetent, irrelevant and immaterial and without a sufficient or any foundation having been laid therefor. This objection does not relate to the lack of proof of efforts by Dr. Israel or Dr. Frisch to locate the alleged original report or to its being in the German language."

Mr. Hays: I offer Defendants' Exhibit A for identification in evidence, subject to translation.

Mr. Barnes: It is what purports to be an extract from a report by this witness to Dr. Richter, dated September 23rd, 1914.

2538 The Court: It has been stipulated in this case, as I understand it, that this paper which is Exhibit A of the answer of this concern Z. E. G. was the instrument under which these shipments were made.

Mr. Hays: Yes, sir. But now the offer that is made here is the memorandum.

The Court: I shall exclude it if Mr. Barnes objects to it.

Mr. Barnes: I object to it.

The Court: Then I exclude it.

Mr. Hays: May I have it marked for identification?

The Court: Certainly.

(Marked Defendants' Exhibit D for identification.)

Mr. Hays: May I have a translation marked? I have not a translation here.

The Court: You may supply a translation later. It will be marked Exhibit D-1 for identification.

Mr. Barnes: We move to strike out the answer, "I believe this is only a copy, but I think I can remember positively that I have drawn a report for his Excellency Mr. Richter dealing with the transactions with Crossman & Sielcken," upon the ground that no proper foundation was laid for showing the witness a paper to refresh his recollection, his memory not having been exhausted as to whether or not he could testify as to the sub- 2540
stance of the conversation between himself, Mr. Sielcken and Mr. Ballin.

The Court: It is my impression that that is absolutely true. If we had the witness here I would not let him look at it for a minute. When was this deposition taken?

Mr. Hays: Last summer.

The Court: What is the question?

Mr. Barnes: The question is, "Is this memorandum which I show you, the memorandum referred to by you?"

Then the answer is, "I believe this is only a 2541
copy, but I think I can remember positively that I have drawn a report for his Excellency Mr. Richter dealing with the transactions with Crossmann & Sielcken."

The Court: I shall deny your motion, Mr. Barnes. You may have an exception.

Mr. Barnes: Then I come down to this question and answer:

"Q. You stated, Dr. Frisch, that Mr. Sielcken considered the matter, will you state what Mr. Sielcken said at this conversation? A. I cannot remember the exact words, the chief point was that Mr. Sielcken was to bear the war risk, and that of course he had to consider it. For us, we had the great interest, because up to this point in other business transactions we had not succeeded in covering the full war risk. I may add that

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we knew Mr. Sielcken to be a great pro-German and that consequently we hoped that we should conclude the transaction with him."

I move to strike out that part of the answer which begins with the words, "For us, we had the great interest, because up to this point in other business transactions we had not succeeded in covering the full war risk. I may add that we knew Mr. Sielcken to be a great pro-German and that consequently we hoped that we should con-
2543 clude the transaction with him," because that was not asked. It was a statement entirely volunteered.

The Court: Does Mr. Hays insist on the rest of that answer?

Mr. Hays: I do not think it is very important.

The Court: Then strike it out.

Mr. Barnes: Then we come to this:

"Q. What did Mr. Sielcken finally say about assuming the war risk? A. He said that he would undertake it for a reasonable commission."

We move to strike that out because the witness
2544 has testified only as to the first conversation. Then he has said that there were other conversations at which he was not present, and that it may be that he had obtained his information from Mr. Ballin or Dr. Richter. Then he is asked what Mr. Sielcken finally said, not at the first conversation, not at the conversation at which Mr. Sielcken said that he would have to consider it. This witness has not testified that he was present at such a conversation. He said there were other conversations at which he was not present.

Therefore, we say it clearly appears from the witness's testimony that he is testifying as to something which he has obtained from what Mr. Ballin or Dr. Richter told him.

(Discussion.)

The Court: I shall overrule your objection, Mr. Barnes. You may have your exception. But I shall attach very little weight to what is said there. It is so vague I can not tell what it means.

Mr. Barnes: Then we have this:

"Q. Was the commission mentioned? A. Yes. I think in the report to Excellency Richter it is said that the commission is to be 10 per cent of the value; and it was said that the commission is reasonable in comparison with the danger." 2546

I move to strike out everything in that answer after the word "yes."

The Court: Motion granted.

Mr. Hayes: Exception.

Mr. Barnes (reading):

"Q. You stated, Dr. Frisch, you could not conclude other business transactions: Did you refer to other business transactions with Crossman & Sielcken? A. No, I think it was the only business transaction with Crossman & Sielcken. We tried to make other business with other firms, expecially I remember we tried to get from American mills to Swedish ports, and in this case we 2547 could not cover the full war risk."

I move to strike out all of the answer beginning with the words "We tried to make other business with other firms."

The Court: Motion granted.

Mr. Hayes: Exception.

Mr. Barnes: I think that is all, sir.

Mr. Hays: The defendant Z. E. G. now offers in evidence a stipulation of December 20th, today.

(Marked Defendants' Exhibit E.)

Mr. Barnes: There is a whole lot in that stipulation to which we want to make objection.

The Court: Mr. Barnes says that he objects to part of the stipulation. It had better be stated on the record

that his right to interpose those objections is not waived by its being marked at this time.

Mr. Barnes: May I ask how late your Honor is going to sit?

The Court: I had hoped to finish the case this afternoon. However, I am willing to sit until seven o'clock.

(Discussion.)

(Mr. Hays then read paragraph 20 of Defendants' Exhibit E to the Court.)

Mr. Hays: I think the word "competency" ought to
2549 go out of that.

Mr. Barnes: Yes.

Mr. Hays: May I cross out the word "competency"?

Mr. Barnes: Yes.

(Mr. Hays then read Paragraphs 1 to 7, inclusive, of Defendants' Exhibit E to the Court.)

Mr. Barnes: As to Paragraph 7 and those immediately following, we have an objection upon the ground that they are immaterial and irrelevant. I should like to have them read, but we want our objection noted, and then your Honor may rule on them.

(Mr. Hays then read Paragraphs 8, 9, 10, 11, 12, 13,
2550 14, 15, 16, 17, 18 and 19 of Defendants' Exhibit E to the Court.)

Mr. Barnes: If the Court please, do you want to rule upon the admissibility that we referred to?

The Court: I shall read Mr. Hays' authorities.

Mr. Barnes: Suppose I make my objection, and your Honor can reserve decision.

The Court: Paragraphs 7 to 16, inclusive, all turn upon one question. They are utterly irrelevant unless Mr. Hays is right on his law. The only question you have there is whether it is *res adjudicata.*

Mr. Barnes: It could not be *res adjudicata,* because there was no final decree. But there would be a question of whether the agreement and compromise made would be binding. It is not a question of *res adjudicata.*

The Court: You understand what I mean. It really all turns upon the one question.

I want to consider Mr. Hays' authorities. If you have got any, I want to consider them also.

I shall read the authorities tonight.

(Discussion.)

Mr. Hays: I should like to move to amend my answer to conform to the proof with regard to the translation of Exhibit A attached to my answer.

Mr. Barnes: What are the words?

Mr. Hays: I should like to insert, "To take delivery of the corporeal property" instead of the word "receive." 2552

The Court: Substitute the words "To take delivery" for the words "To receive" in the third line of Exhibit A attached to your answer.

Mr. Hays: The amendment I want to make in my answer is to conform Exhibit A to the translation as testified to by Dr. Burchard.

The Court: Is there any objection to that?

Mr. Barnes: No, there is no objection to that.

The Court: Is there any further proof?

I am going to reserve ruling on these objections you have made to portions of Exhibit E. I shall try to read the authorities tonight, and in the morning we can take up the details. 2553

(Adjourned to December 21st, 1929; 10:30 A. M.)

New York, December 21st, 1929,
10:30 A. M.

Trial resumed.

The Court: Gentlemen, overnight I have examined the authorities you submitted to me.

I have also examined your briefs. First, I think this morning you should dispose of the questions that were pending last night on the objections raised to certain paragraphs of the Exhibit E. If either of you can

furnish me any additional light upon the question under discussion at the time of adjournment as to whether or not the outbreak of the war between the United States and Germany had the effect of *ipso facto* dissolving the partnership agreement, I would like to hear from you further upon that point.

Mr. Hays: Judge Caffey, the only cases that I have on it are Mayer v. Garvin; Rossi v. Garvin and Sutherland v. Mayer. I am sure I can get further authorities from the Civil War time and otherwise, but to me the
2555 matter is so clear. Mr. Barnes seems to find the distinction in the fact that here the parties were American citizens. I find no such distinction in Anglo-Saxon law.

The Court: On that proposition I do not think Mayer v. Garvin, Rossi v. Garvin and Sutherland v. Mayer have the slightest bearing on this question.

Mr. Hays: Upon the question of the dissolution of the firm?

The Court: Not the slightest.

Mr. Hays: That is all I have so far.

The Court: The proposition there is whether or not where there is an existing agreement between nationals
2556 of two countries who later go to war, as a result of the war that there is a dissolution of the partnership agreement.

In this case the partnership agreement was between American citizens; and it is inconceivable to me that there should be a precedent in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country which results *ipso facto* in a dissolution of his partnership.

I do not believe that it even results in a suspension during the period of the war, in a suspension of the partnership. It is very certain in my mind that it cannot affect the rights of the parties into ceasing with respect to a transaction which occurred long prior to the war.

I do not find anything in the authorities to indicate that war has any such harsh consequences, and it does

not follow from the fact that for purposes of administering our own affairs in the way that we see fit, that we provided in such a statute as that, the Trading with the Enemy Act, for the regulation of affairs during the period of the war, and for the purpose of such regulation that we shall in the respects specified in that statute in the administration of the matters dealt with by that statute, treat an American citizen who is in an enemy country, for the purpose of the statute, as an alien enemy.

It does not follow at all from that that he is an alien 2558
enemy in the sense that a national of the country with which we are at war is an alien enemy.

Mr. Hays: Will your Honor take the reasoning behind it? I would suppose the reason why the partnership was dissolved was because of the impossibility of intercourse during the war. If that is so, it would apply whatever the nationality of the particular individual might be. I would suppose that the partnership was dissolved because the people were in difficulty and because the American in Germany occupied an enemy status; and my view was the nationality had nothing to do with it, but I have nothing further to present to 2559
your Honor along that line.

The Court: It may very well be that during the period of the war, Mr. Hays, in respect to transactions occurring during the war would be affected by the Trading with the Enemy Act, and could be lawful only upon compliance with the provisions of that statute.

It does not follow that with respect to this property, the status of which had become fixed prior to the war, that the occurrence of the war so far dissolved that partnership as to change the rights with respect to that property. That is my view.

Mr. Hays: Well, now, you take, your Honor, powers of attorney during the war, in Sutherland v. Mayer, there was a power of attorney from the German in America to the firm abroad, the members of the firm abroad under which they were to pay certain amounts

of money to his firm and the Supreme Court of the United States held that power of attorney was revoked by the war.

I know in the Civil War a great many of those were revoked and none of these, so far as I know, have ever raised a distinction depending on the nationality of the individual.

The Court: It is a very clear distinction in my mind. I consider it of very little consequence whether I retain in the case the various paragraphs of Exhibit E
2561 from No. 7, as I recall, to No. 17, inclusive; or whether I merely pass upon the effectiveness.

Nevertheless, I wish Mr. Hays to give you an ample opportunity to reverse me if I am in error, and possibly it is a good way to put the record in the shape where it preserves your rights and pleadings and upon the renewal of Mr. Barnes' objection to these various paragraphs then I will pass upon them and Mr. Hays can take his exception.

Mr. Hays: Yes, sir.

Mr. Rhodes: Your Honor may I say a word on that? The Trading with the Enemy Act defines an enemy as
2562 any individual, partnership or any body of individuals of any nationality resident within the enemy territory.

The Court: Exactly.

Mr. Rhodes: The language does not say "nationality" but it says "resident within."

The Circuit Court of Appeals of this Circuit has held that "resident within" means domiciled in the case of Stadtmuller v. Miller.

The Court: I agree with that.

Mr. Rhodes: And then it goes ahead and says in Section 3:

> "* * * of any person in the United States except with the license of the President granted to such person, or to the enemy or allied enemy as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to or from, or for, or on account of or on behalf of, or for the benefit

> of any other person with knowledge or reasonable cause to believe, that such other person or enemy or allied enemy is conducting or taking part in such trade, directly or indirectly, for, or on account of or on behalf of, or for the benefit of the enemy or allied enemy * * *"

is unlawful to do that, and it goes ahead and provides penalties to do that.

If this partnership continued the conduct of the business by the American partner, residing in the United States, it would be in part for the benefit of the home 2564
partner, Sielcken, whom this evidence here shows was domiciled in Germany.

He had his estate over there; he lived there. His office was there, and his business was there. That was his home and domicile. That would be in clear violation of the Act for the American partner to continue to carry on the business for him; so it must obviously follow that the partnership was dissolved upon the declaring of war because nowhere in the Act is there based upon citizenship any standard, but it is based upon domicile.

The Court: That is entirely true, so far as any current transactions or communications between them are 2565
concerned, but in so far as concerns transactions occurring long prior to the war—and that is what we are concerned with here—I am going to hold that it certainly follows that the German executives of Sielcken had no authority to deal with that prior transaction so as to determine, as between the German Government or of this organization acting for the German account that you referred to, to be adjudicated or passed upon in any such proceeding.

Mr. Rhodes: As I understand your Honor, you do not rule that the partnership was not dissolved.

The Court: It may have been suspended for the purposes of the Trading with the Enemy Act. You may call it dissolved. I do not care what you call it.

I am trying to draw a distinction between the necessary consequence of the war and the provisions of the Trading with the Enemy Act, because we are not concerned with the provisons of the Trading with the Enemy Act here in that regard.

Mr. Rhodes: I gleaned the impression that you thought there was a distinction between an American citizen residing in Germany and a German citizen.

The Court: There is a vital distinction. It is a governing distinction.

2567 Mr. Rhodes: I do not see that, your Honor.

The Court: Mr. Rhodes, it is not true to the extent that you are dealing with these matters which, as a matter of municipal regulation, come under the administration of the Trading with the Enemy Act. That is true.

Mr. Rhodes: But, your Honor, the purpose of Congress was to place all persons resident in Germany, because Congress realized that some of the most dangerous enemies we had were American citizens that came over here and made their money and went back to Germany. There is nothing wrong about seizing the property of an American citizen providing it is not

2568 confiscated; and it was, under the Trading with the Enemy Act, done throughout the war repeatedly; and Congress even provided for the return of property to American citizens after the Armistice, long before the state of war had ended.

In 1919, they provided for the return of property to American citizens. That was to return the property of American citizens who were involved in this Act.

The Court: The Trading with the Enemy Act had two general purposes.

One of them was to assist in the more effective prosecution of the war; and the other one was to ameliorate some of the old hardships of the war and Congress may or may not have been wise in some of the provisions it made in that regard, but, nevertheless, that was the endeavor on the part of Congress on this question; which, as I see it, is not determined by the provisions of the Trading with the Enemy Act.

Mr. Rhodes: I am not prepared to discuss the power of the German executives on the German law; but I want to clear this point so that it will be clear, and so that there would not be any mistake on that point, because it seems to me that it was absolutely correct that this partnership was dissolved by the declaration of the war because the partners were domiciled in different countries.

The Court: I am going to give you a square ruling and you can take an exception.

I have not had a great deal of time to make up my 2570
mind, but I have examined all the authorities to which I have access and I have reached a conclusion in my own mind.

Mr. Rhodes: That the partnership was dissolved?

The Court: No, it was not, not for the purpose so far as we are concerned with it in this case.

Mr. Barnes: As I understand it, your Honor's ruling is going to be directed to the fact as to whether or not this settlement in Germany is binding upon these plaintiffs, whether it is for one reason or another is not involved in your ruling.

The Court: Nevertheless I will express one ground 2571
for it.

Mr. Barnes: On this I would like to give you a thought that occurred to me at five o'clock this morning, and those thoughts are generally good.

In Section 19 of our stipulation it is provided as follows: That in September, 1917—this was before Herman Sielcken was dead.

The Court: Yes.

Mr. Barnes: The War Trade Board of Washington reversed the Trading with the Enemy license to the co-partnershp of Crossman & Sielcken and directed that the co-partnership be liquidated by Sorenson & Nielson, that is, the plaintiffs in this case, that is, September, 1917, of the American citizens.

The American Government steps in and says this thing is to be liquidated by Sorenson & Nielson.

Can you tell me of any German executive going ahead and liquidating or settling or making any arrangement that is binding upon our Government the time of which is dated in the time of war? That is an ample sufficiency, in my opinon, to sustain the position taken.

The Court: Yes, I am just giving you an illustration of what I say the Trading with the Enemy Act was intended for—to ameliorate the hardships of war.

Mr. Rhodes: Would your Honor's ruling be affected if you came to the conclusion that the settlement had
2573 been ratified by Sorenson and Nielson?

The Court: I have not heard the slightest evidence of that. You will find there was no ratification on the part of Mr. Nielson.

Mr. Rhodes: Is Mr. Nielson here?

(No response.)

Mr. Barnes: Then for the purpose of your Honor's ruling the plaintiffs object upon the ground—

The Court: Take it paragraph by paragraph.

Mr. Barnes (continuing): —upon the ground that the facts therein stated are irrelevant and immaterial to the following paragraphs of the stipulation which has
2574 been marked—

The Court: Exhibit E.

Mr. Barnes (continuing): —Exhibit E.

The Court: Call them by paragraphs.

Mr. Barnes: Paragraph Seven.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Eight.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Nine.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Ten.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Eleven.

The Court: I have forgotten what Paragraph Eleven

Mr. Barnes: That is that the arbitration proceed and the parties—

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Twelve.

The Court: That is as to the provision for expenses.

Mr. Barnes: Yes.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Thirteen.

The Court: Sustained. 2576

Mr. Rhodes: Exception.

The Court: I may say that in that connection, I do not find the slightest evidence there of ratification.

Mr. Rhodes: These letters that were exhibits in 1920 for a period of seven years seem to be some evidence of acquiescence.

The Court: None whatever.

Mr. Rhodes: Full knowledge.

Mr. Barnes: Paragraph Fourteen.

The Court: I have not a memorandum of that.

Mr. Barnes: That is that Mr. Nielson was in Germany. I will not object to that. I will let it in. 2577

Mr. Rhodes: Yes. May I make this clear on the record?

I understand the objection is to each and every part of those paragraphs, is that right, Mr. Barnes? I think the Judge ruled on each and every part. There may be some parts there that may be different from other parts, and Judge Caffey ruled that they all follow the same category.

The Court: You are correct. You are entitled to have that square ruling.

Mr. Barnes: I have a little doubt—

Mr. Rhodes: What I have in mind is this: We have some letters there that in themselves may not be competent or material. If not, if Judge Caffey rules with me, I want to be sure that you are objecting to each and every part of the paragraphs.

Mr. Barnes: I think, if your Honor please, that I will

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withdraw my objections and let the stuff in and accept your Honor's ruling on the law.

The Court: I do not think it makes the slightest difference.

Mr. Barnes: I do not think it makes the slightest difference, either. I do not see any point to my grounds for appeal. I will withdraw all my objections.

The Court: Now, gentlemen, I have another question to submit to you before we proceed further.

I have been thinking about the Fisch deposition; and
2579 I have been studying it the best I could. The September 25, 1914 letter, Exhibit A and the answer of Mr. Hays here.

Where a deposition is taken under the circumstances of that deposition, a long ways from home, counsel present on both sides I should be unwilling, as I said yesterday, to enforce very strictly the rule as it might be enforced if the witness were here present on the stand as to a thorough establishment of his inability to remember a transaction inquired about without resort to a paper, before permitting him to resort to that paper for the purpose of refreshing his recollection; and as
2580 I indicated yesterday, therefore, so far as concerns that ground I was unwilling to sustain Mr. Barnes' objection; but as to that he had another ground, and I recall his statement of his objections, and that I want to consider.

The portion of the deposition of Dr. Fisch, as I let it in, as I told you yesterday, is so very general, that it does not seem to me sufficient to sustain the finding of a separate and independent agreement between Sielcken and the German agency whereby Crossman and Sielcken undertook to bear the risks of transportation of these cargoes across the ocean.

But there is another point, and that is this: It goes to the competency of this evidence; and I am doubtful whether I was right in letting it in on that ground. That is what I want to bring up for your consideration here and to hear from you on.

As you read the testimony of Dr. Fisch with its only

two courses preceding the entering into of this instrument, the letter of Aprl 25, 1914, which contained—

Mr. Barnes: September.

The Court (continuing): —of September 25, 1914, which became the exclusive basis for the conduct of these transactions; I am therefore very doubtful whether or not I should sustain Mr. Barnes' objection to the admission of that testimony as to those oral conversations. Am I right in my recollection that that was the ground of your objection?

Mr. Barnes: That was one of the grounds, yes. I 2582
objected to it on the ground it was incompetent.

The Court: I would like to hear from you on that, both of you.

Mr. Hays: My argument is so simple that it will doubtless occur to your Honor, we have chiefly testimony contradicting the terms of a written contract; and I should say it was inadmissible to any interpretation of that written contract or of the contract itself.

I think conversations that do not bear on the contract or make clear the interpretation of the contract and what was in the minds of the partners must be irrelevant. 2583

Suppose, for instance, Fisch had said what I have said in my argument to your Honor. It is insane to conceive that these men would have made a contract by which the risk of loss would have been on the Germans, because if they had the goods would have been seized immediately; and I cannot conceive of any man of intelligence having made such an agreement and I do not think they did.

Fisch says he had a conversation with Sielcken by which Sielcken claimed all the risk of loss was on him. It does not vary anything in the contract, because it does not say where the risks and losses were. It says, according to my interpretation, that the Germans had no obligation at all on the goods delivered in Baltic ports.

(Discussion.)

Mr. Barnes: On that point my position is this: That the contract itself, assuming that it is and if you re-

gard it as a purchase agreement or as a C. I. F. contract—

The Court: I do not care whether it is a purchase contract or whether it is an instrument under which these exclusive transactions were conducted—I am not passing now upon that—but I am getting down to the point as to whether the controversy, if it should be dissolved upon the assumption that this instrument were for the exclusive memorial of the arrangement between them upon which they acted. Therefore, I want to determine
2585 whether it is competent or not for me to give weight to the various negotiations that preceded the formulation of this document. That is what I am trying to get at. I am not deciding the case one way or the other at this time.

Mr. Hays: If that is so the conversations would not vary it.

Mr. Barnes: The stipulation which we made—

The Court: I read the stipulation.

Mr. Barnes: That says that Exhibit A is a complete copy of the agreement between the parties, and upon the basis of that stipulation Mr. Hays is permitted
2586 to come into this court by agreeing to it. He was in default and we opened his default and I consented to be bound entirely by everything in that stipulation.

Mr. Hays: I am trying to avoid it.

Mr. Barnes: I know you are.

(Discussion.)

Mr. Barnes: I think I had better let it go in.

The Court: I am going to give a square ruling.

Mr. Hays: Of course, I would prefer to have the ruling. I am not thankful to Mr. Barnes when he says that it does not make any difference.

The Court: All right; I will exclude the testimony so that you may have your exception.

Mr. Hays: Thank you. I take an exception.

Will your Honor state the grounds of your ruling?

The Court: It is incompetent, for one thing; and it does not prove anything to let it in, so it is irrelevant.

Mr. Hays: I take an exception.

The Court: Proceed.

Mr. Barnes: I want to clear up the record with respect to definition of German Law that has been set up.

The Court: Well, now, Mr. Barnes, I want to go ahead and get a record before me and then I am going to hear all oral argument. Are you going to put in testimony or close?

Mr. Barnes: There is no more testimony. It is a stipulation.

The Court: Do you mean you close now? You rest?

Mr. Barnes: No, I want to put this stipulation in 2588
first.

The Court: Oh, there is a stipulation.

Mr. Barnes: It is stipulated by the defendants that they withdraw the defense of foreign law which is set up in the third and fourth separate defenses of the defendant Z. E. G. and that for the purposes of this case the Court is to decide the construction to be given the agreement, Plaintiffs' Exhibit 1, by the rules of American Law.

Now, I think everybody rests.

Mr. Hays: Yes, sir.

Mr. Barnes: And we rest. 2589

The Court: Everybody rests.

Mr. Hays: I move to dismiss the plaintiffs' case on the ground that the plaintiff has not shown a cause of action or any liability on the part of the defendant Z. E. G.

Mr. Rhodes: Your Honor, I move that the bill of complaint be dismissed because the plaintiff has not established a cause of action.

The Court: Motions overruled, and you may have your exceptions.

Mr. Rhodes: Note an exception.

TESTIMONY CLOSED.

(Argument by Mr. Barnes.)
(Argument by Mr. Hays.)
(Argument by Mr. Rhodes.)
(Argument by Mr. Abramson.)

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Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSON, as the surviving partners of Crossman & Sielcken,
Plaintiffs,

2591 vs.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFSGESELLSCHAFT, m. b. H.,
Defendants,

In Equity 44-28.

Before: Honorable Francis G. Caffey, District Judge.

Barnes, Avery & Whiting, Solicitors for plaintiff, Earl B. Barnes and George W. Alger, counsel.

2592 Charles H. Tuttle, United States Attorney, Solicitor for defendants, Thomas E. Rhodes, Special Assistant to the Attorney General, Counsel.

Arthur Garfield Hays, Solicitor for defendant Zentral-Einkaufsgesellschaft, Arthur Garfield Hays and William Abramson, Counsel.

Memorandum Opinion.

The Court (Orally): Gentlemen, when I accepted the assignment to try this case, I told you that it would be necessary for me to render a prompt decision; that it would be impossible for me to reserve decision, and in the nature of things, it is impossible for me in rendering an immediate decision, to formulate any elaborate or reasoned statement of the grounds for my decision.

All that I can do is to give you an indication of the steps in my reasoning, by which I reach the result.

It seems to me that this case, under the proof, can be completely determined by resorting solely to an interpretation of the document in evidence, which has been referred to as the letter of September 25, 1914. I see no escape from the interpretation of that letter, under the circumstances of its issue, under the uses for which it was intended and under the uses made of it, except that Crossman & Sielcken became merely purchasing 2594
agents in the employ of the Reichenskauff. If I am right on that, that is the end of the case, and disposes of the issues, and I think I am right. It is true that Mr. Hays urges that there are expressions in the last paragraph of it, which were not necessary to be incorporated in it, if the document was designed to define the relationship between principal and agent. Nevertheless the incorporation in the document of unnecessary clauses is not controlling in its interpretation, and I see nothing in the last paragraph that is inconsistent with the existence between Crossman & Sielcken on the one hand and the Reichenskauff on the other, or an agency by Crossman & Sielcken for their employer. 2595

It is not necessary, therefore, for me to go into the various other phases of the case.

Nevertheless, from the time I took the course on Carriers from Professor Beale in law school, it has been my impression that the fact of the issuance of bills of lading, with their accompanying shipping documents, under the circumstances revealed by the evidence in this case, caried with it the risk on the part of the purchaser or consignee of loss of the goods during the course of transportation. I see nothing inconsistent with that view in the expressions of Professor Williston in his book on Sales to which reference has been made here.

I have already indicated to you my view, that under the partnership agreement, the executors of Sielcken in Germany, had not the slightest authority or right to settle or otherwise dispose of a partnership asset which had come into existence long prior to our entering the War, out of these transactions which occurred in 1914.

Now, I think that disposes of all the substantial issues in this case.

The plaintiff may have a decree for the relief asked for in the complaint. The decree may be settled upon notice. As to the notice, you gentlemen can agree upon it. How much notice do you want?

Mr. Barnes: Three days notice?

The Court: Very well, three days notice.

2597 Mr. Hays: I am not sure whether the decree necessarily carries interest. I should say, in a court of equity, where the plaintiff slept on his rights during a number of years, is a matter for consideration, but at any rate, if there is any question about it, I would like to save my point on that.

The Court: I will hear from you. I assumed as a matter of course, that it would carry interest. The money was there; it has been earning interest while it was down there and I do not see why those entitled to it should not have the benefit of it.

Mr. Hays: If your Honor will make a ruling on it, I will save my exception.

2598 The Court: The recovery of the plaintiff will carry interest.

Mr. Rhodes: What interest? The legal rate of New York?

The Court: What has been the custom in such cases here?

Mr. Barnes: The usual rate of interest, six per cent.

The Court: Is that the usual custom? Tell me what is the custom?

Mr. Rhodes: The custom, as I understand it, is that the contract is covered by the law of the state under which it is made. For instance, a contract in the State of Louisiana carries five per cent interest; I understand that interest in this state is six per cent.

The Court: I think so. It will be six per cent interest and you may have your exception.

Mr. Hays: Exception.

New York, December 21st, 1929.

Reply Affidavit of Franck C. Sterck. 2599

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.
In Proceedings to Vacate Final Decree of December 30, 1929.

Equity No. 44-28. 2600

City of New York,
County of New York, ss.

Frank C. Sterck, being first duly sworn, deposes and says: 2601

That he is an attorney in the United States Department of Justice.

That he has examined the affidavits of Messrs. Brainard Avery, William Abramson, Selden Bacon, George O. Castell, Richard S. Doyle, Charles D. Hamel, Orrin R. Judd, John F. McIlwain, Leonard B. Smith, George E. Warren and Frederick Wirth, Jr., and the exhibits attached thereto, in Proceedings to Vacate Final Decree in the above entitled matter.

The affidavit of Mr. Brainard Avery, insofar as material and relevant to these proceedings on Motion to Vacate Final Decree, attempts to establish three points:

1. That the claim arising out of the one-half interest of the firm of Theodor Wille in the cargoes was settled and discharged prior to the institution of this cause, the payments of $50,000 each by the defendant Z. E. G. and

by the plaintiffs having been made to Theodor Wille out of the funds recovered herein because of some threatened claim, the basis of which was never made known to the plaintiffs or their attorneys or apparently to any one else connected with the case.

2. That the bringing of this suit in the names of the surviving partners, without joining the executor as a party, was proper even after dissolution of the partnership.

2603 3. That the payment by the plaintiffs of $363,340.70 to the attorney for the defendant Z. E. G. out of the money recovered in this case was simply a compromise of a claim existing under an indemnity agreement signed by the German Executors of the Estate of Hermann Sielcken in Germany.

With reference to the first point, attention is called to extracts from the affidavit sworn to by this deponent on May 18, 1938 and to the exhibit attached thereto: On page 4 of said affidavit there is set forth a letter from Hermann Sielcken to John S. Sorenson, one of the plaintiffs in this case, dated September 22, 1914, in which it is stated that 2604 "Wille share the risk with us" (Exhibit E). On the same page of deponent's affidavit there is quoted an extract from an affidavit executed by Mr. Sorenson on October 26, 1927, in which he states that he received instructions from Sielcken "to purchase and ship food and similar stuff for the joint account of Crossman and Sielcken and Theodore Wille, Hamburg."

In a sworn claim filed in 1922 before the Mixed Claims Commission, United States and Germany (Exhibit L of this deponent's main affidavit), the then Columbia Trust Co., as Executor of Sielcken's estate, together with the plaintiffs in this case, sought an award against Germany "for the loss sustained by them as aforesaid in the sum of $190,133.65, being one half of the total value of said merchandise ($380,266.09)." The reason for claiming only one-half of the value of the cargoes in this Memorial is therein stated to be because "it was agreed that the merchandise so to be purchased and shipped

should belong in equal undivided shares to the said two firms of Crossman & Sielcken and Theodor Wille respectively, and that the purchase and sale should be for their joint account as a joint adventure."

When in 1931, the widow of Herman Sielcken, Clara Sielcken-Schwarz, brought an action in the Surrogate Court for New York County against the Irving Trust Co. as executor of the Estate of Sielcken, there was admitted in evidence (marked Petitioner's Exhibit 543), a copy of an extract from certain Crossman and Sielcken ledgers known as "Crossman and Sielcken, Copenhagen Joint Account." 2606 The ledger shows the entry "to amount of Theodor Wille's half share of loss on Copenhagen cargoes shipped in 1915." The shipments listed thereon are the shipments upon which this suit was brought (Exhibit U of this deponent's main affidavit).

It will be noted that the affidavit of Mr. Avery in no way modifies, disputes or contradicts the fact of the joint ownership of the cargoes at the time of their seizure by the British authorities.

On the contrary, the affidavit of Mr. Avery admits (page 6) that the Memorial filed before the Mixed Claims Commission sought "to recover only a one-half interest in the cargoes on the theory that Theodor Wille was responsible 2607 to Crossman & Sielcken for one half of the loss." Mr. Avery explains, however (page 7), that counsel who filed that Memorial, although aware that "Mrs. Sielcken claimed to have adjusted that matter herself with the firm of Theodor Wille," advised the executor that Mrs. Sielcken "had no authority to make a settlement of any claims of the firm, and the supposed settlement with the firm of Theodor Wille made by her was not binding."

It further appears from Mr. Avery's affidavit that the executor having reversed itself in 1924, acknowledged that the settlement made by Mrs. Sielcken with Wille was binding (page 7-b); that the claim of Crossman & Sielcken against Theodor Wille was thereupon "charged off to Profit and Loss on the books of Crossman & Sielcken" (page 7-b); and that because of such settlement the firm of Theodor Wille acknowledged in 1927 and 1928, that

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it no longer had any interest in the seized cargoes (pages 7-b and 8).

It will be observed from Mr. Avery's affidavit, therefore, that it is admitted that prior to as well as at the time of seizure in 1915, a one-half interest in the cargoes unquestionably existed in the firm of Theodor Wille; that a settlement was made by Mrs. Sielcken and the German executors with the firm of Wille pursuant to which that interest, standing on the books of Crossman & Sielcken as Theodor Wille's share of the loss of the
2609 cargoes, was written off in 1924; and that counsel for the plaintiffs in the instant case were fully advised by counsel representing Wille, prior to the institution of this suit in 1927 and 1928, that such an interest did exist until the date of the settlement which occurred subsequent to October 6, 1917. In other words, it is now clearly established, through copies of formal claims, sworn affidavits, letters and books of account, that the partnership of Crossman & Sielcken was not at any time prior to the passage of the Trading with the Enemy Act (October 6, 1917), nor for several years thereafter, the sole owner of the shipments out of which arose the alleged debt for the recovery of which the present suit was filed.

2610 The affidavit of Mr. Avery proceeds to explain at great length the matter of the "threatened claim" (page 42) which Theodor Wille asserted against the funds paid by the Alien Property Custodian and Treasurer of the United States pursuant to the decree entered in this case. According to Mr. Avery (page 41), he was informed by Mr. Hays' office that the firm of Theodor Wille would sign certain releases and join in the settlement of March 27, 1930 (see Exhibit W of this deponent's main affidavit), whereby it was provided among other things "that the claim of Theodor Wille against Crossman & Sielcken in liquidation, and/or Estate of Hermann Sielcken, and/or Mrs. Clara Sielcken-Schwarz, and/or Zentral Einkaufsgesellschaft, should be finally settled by the credit of the sum of $100,000 in favor of Theodor Wille Santos with the J. Henry Schroder Banking Corporation, 46 William Street. This sum of $100,000 was contributed, $50,000 by

Zentral Einkaufsgesellschaft and $50,000 by Crossman & Sielcken in liquidation."

Mr. Avery's affidavit emphatically reiterates for some ten pages (pages 40 to 50) that the nature of the claim was entirely undisclosed, its basis unknown, and, in fact, that he, Mr. Avery, and his associates, Messrs. Barnes and Doyle, were of the impression "that this application for $100,000 was in the nature of a 'hold up'" (page 46).

It will not escape the mind of any one reading Mr. Avery's affidavit, of course, that the payment of $100,000 to a stranger in a litigation, half of which is contributed 2612
by the successful plaintiff in the case and the other half by the losing defendant, is, to say the least, a fantastic situation. The fantasy becomes completely ridiculous, however, when repeated emphasis is made of the fact that the $50,000 "contributions" were made in discharge of "some undisclosed claim or claims" (page 45).

It is because of this situation that this deponent desires to call attention to certain statements previously made by Mr. Avery, under oath, so that there may be introduced into the record the fact that Mr. Avery on several occasions heretofore did explain the reason underlying the Wille payment although in the present affidavit Mr. Avery 2613
repeatedly asserts that "we never have known the nature of the claim Wille was threatening to make."

Statements made in affidavit of Mr. Brainard Avery executed on August 11, 1938, and filed in Proceedings to Vacate Final Decree herein:

"About that time also deponent inquired of Mr. Hays whether he represented Wille and Mr. Hays replied that he did not but that he might be retained by Wille.

"Deponent then asked Mr. Hays what claim Wille made, or threatened to make, and Mr. Hays was very indefinite about it, and never made an attempt to or did give any explanation of the nature of any claim that was made by or might exist in favor of Theodor Wille (p. 41).

"No explanation whatsoever was vouchsafed to us as to the nature of this

Statements made in affidavit of Mr. Brainard Avery executed on April 22, 1932, and filed before the Surrogate for New York County in the Matter of the Estate of Hermann Sielcken, deceased, the pertinent part of which is annexed hereto and made Exhibit 1: "The prosecution of these claims ultimately resulted in:

"(1) A decree entered on December 30, 1929, in the United States District Court for the Southern District of New York in favor of the liquidation of Crossman & Sielcken against the Alien Property Custodian and Z. E. G. for $727,618.93, including accrued interest, which was paid, principal and interest, in April, 1930. The private banking house of Theodor Wille, of Hamburg, Germany, had in fact a joint one-half beneficial interest with Crossman & Sielcken in the claim aris-

threatened claim and we never have known the nature of the claim Wille was threatening to make (p. 42).

"In view of this threat of Wille to assert against Sielcken's assets in Germany some undisclosed claim or claims, we were absolutely insistent on having releases from Wille that would cover every possible claim that that firm could think of asserting. * * *

"Prior to the meeting of March 17th, 1930, and I think at Mr. Hays' office, on March 14th, 1930, a discussion ensued in
2615 the course of which it was stated by or on behalf of Mr. Hays that he could secure the execution of the desired release from Wille at a cost of $100,000. We have never known what claim Wille thought of asserting (p. 45).

"I explained to Mr. Bonynge, the American Agent, personally, this demand for $100,000 and our ignorance of what it was for, but that it seemed to me that it was worth while to contribute $50,000 to Mr. Hays, if Z. E. G. would, to see the settlement go through, even without knowing on what ground the claim was made, and that the settlement, with that $50,000 deducted, would still be within the authority to settle conferred on us by Mrs. Sielcken Schwarz. Mr. Bonynge
2616 adhered to the position shown in his letter of March 11th, 1930 (p. 46).

"We have never heard nor been informed in any way what the claim Wille proposed to make was, except the assertion in the most general terms, that if they did not get that $100,000 they were going to start litigation which would be embarrassing to the estate of Sielcken; whether that in Germany or that here they did not say.

"No claim was ever made by Theodor Wille that they were entitled to any part of the recovery from Z. E. G. under the judgment herein, but only that they wanted $100,000 to be paid them, half by the plaintiffs and half by Z. E. G." (p. 48).

ing upon the said Copenhagen cargoes, and, too, at the time of said recovery and because thereof, Z. E. G. was in effect asserting a substantial claim against Crossman & Sielcken by way of the estate of Hermann Sielcken, in Germany, by reason of a settlement that had been made during the period of the world war, with reference to said cargoes, between Z. E. G. and the executors in Germany of the Sielcken estate, undertaking to act in said matter.

"In order to work out a settlement of these conflicting interrelated claims existing between Z. E. G., the house of Wille and the estate of Hermann Sielcken, all finding their origin in the matter of the Copenhagen cargoes, a settlement was made between the said parties, whereby one-half of the aforesaid sum of $727,618.93 was paid to Z. E. G. in consideration of the release of its said claim and the sum of $50,000 was paid to the house of Theodor Wille in release of its said claim, so that out of said total sum recovered there was left to the estate of Hermann Sielcken the net sum of $313,340.70, subject to legal fees and expenses" (p. 39). (Emphasis supplied.)

Extract from direct testimony of Mr. Brainard Avery on examination by Mr. Selden Bacon in the Surrogate's Court for New York County, in the Matter of the Estate of Hermann Sielcken, deceased:

Before Walter W. Seligsberg, Esq., Referee; Vol. 4, pp. 1623-1624:

"A. (Continued) And Alex Sielcken had shown me that one-half of these cargoes was in the joint account and owned by Wille of Hamburg, a British enemy. I asked Mr. Warren if he could explain the discrepancy between the ownership being alleged by the American Government as entirely in Crossman & Sielcken, whereas the books showed that one-half of the cargoes were owned by a German enemy. I told Mr. Warren that theoretically, if Great Britain paid for the cargoes, that one-half of that recovery must, on the face of things, be remitted to Wille, a German enemy; that I had been informed in Washington that theoretically it was an international crime." (Emphasis supplied.)

Mr. Avery's affidavit contains the following statement on page 49:

> "None of us had at any time any thought of arranging to get money out of the Treasury of the United States or from the Alien Property Custodian on the basis of getting a consent recovery in this suit on the basis of dividing up the proceeds with Germans. What we were compromising with Z. E. G. was simply the outside claim under the indemnity agreement that had been signed by the German executors, a claim which we regarded most seriously despite the opinion of Dr. Neumann, a copy of which is hereto annexed, marked Exhibit C." 2618

Attention is further invited to the testimony of Mr. Avery, taken in January of 1935, before Referee Seligsberg in the Matter of the Estate of Hermann Sielcken, deceased, Surrogate's Court for New York County, where the following appears (Vol. V, pp. 1660-63) (see Exhibit T of this deponent's main affidavit):

> "Q. Will you proceed with your narrative, please, as to what you did after the successful termination of the trial? A. In January, the arrival of counsel for 2619
> the German Agent brought notice to me of the beginning of conferences in Washington looking to the arrival of the German Agent himself, Von Lewinski, and there were several of those meetings in Washington at different times, leading up to the performance of the tentative agreement for fifty-fifty settlement arrived at in Berlin in April, 1928.
>
> Mr. Bacon: That was first recommended at sixty-forty, was it not, and then afterwards fifty-fifty?
>
> The Witness: Yes. We tried to get sixty for the estate.
>
> Mr. Bacon: If I may interject here, after Von Lewinski came to Washington, sixty-forty was recommended by him; that was the subject of discussion, was it not?
>
> The Witness: Yes, there was a discussion about the

2620 rate of exchange of the German Mark, which would have resulted in an increase to sixty per cent from fifty per cent. Dr. Von Lewinski said that he remembered that the judgment of Solomon had been agreed to in Berlin of dividing the baby.

Mr. Bonynge attempted to get a larger net result by using a different rate of exchange in the settlement. Von Lewinski's reply was that he thought he had a gentlemen's agreement, but he was not certain what a gentlemen's agreement with a lady meant.

2621 Finally, it went through exactly as it was arranged in Berlin.

The Referee: When you say sixty-forty and fifty-fifty, you refer to some liquidated amount, half of which was to be paid in settlement?

The Witness: Yes. We had to reduce the Marks to dollars, and much would depend upon what rate of exchange was used, as to whether, in returning to the estate and to Crossman & Sielcken in liquidation—what they got in dollars.

The Referee: There had been an agreement, then in Berlin on an amount of Marks that was due somebody over here?

2622 The Witness: Not quite. The agreement was that right straight through, there should be an even division, even extending to the moneys in possession of the A. P. C.

The Referee: Even division between whom? That is what I cannot get into my head.

The Witness: The estate was to take one-half and the Germans were to get the other half, or to be released from the other half of the—

The Referee: In other words, there was to be an agreement on the claim, and the German Government was claiming either 60 per cent or 50 per cent?

The Witness: Or to receive 50 per cent because they received one-half of this Z. E. G. money which came from the A. P. C., and they paid one-half of the settlement which was necessary to make with the house of Theodor Wille."

Attention is called to the affidavit sworn to on the 30th day of July, 1938, by Mr. Orrin R. Judd, wherein Mr. Judd stated, in speaking of the period from May 1925, to 1935, when he was in primary charge of all matters affecting the Sielcken estate and the firm of Crossman & Sielcken for the Irving Trust Co.:

"That at no time during that period was any claim ever made to this executor or to any one connected with it so far as deponent ever heard, either by the firm of Theodor Wille of Hamburg or by the firm of Theodor Wille of Santos, South America, or any one 2624
in their behalf, that either of those firms had any interest whatever in any sum that might be recovered on behalf of the said firm of Crossman & Sielcken from any purchasers of what are known as the 'seized cargoes' as to which the above-entitled suit was brought in this Court.

"No explanation was ever made to us or reported to me or to the Trust Company of the basis on which the firm of Theodor Wille made a demand in 1930, on the Zentral Einkaufsgesellschaft and the German Agent before the Mixed Claims Commission, for payment of $100,000 as a condition to its signing 2625
various papers required for the settlement of the two claims before the Mixed Claims Commission, and the claim of the Zentral Einkaufsgesellschaft for indemnity, and the payment of the judgment recovered in this suit.

"The first I ever heard of that demand was at a time considerably after the entry of the decree herein and, as I recall it, some time in March, 1930. At that time I had been informed by Mr. Avery that the negotiations with Dr. von Lewinski, the German Agent, had reached a conclusion that was satisfactory, both to the Zentral Einkaufsgesellschaft and to Mrs. Sielcken Schwarz, but that after such agreement had been reached in theory, which included also the settlement of the claim made by the Memorial filed against Wille, Dr. von Lewinski had stated that

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he was having difficulty about obtaining the required releases from Theodor Wille.

"After some negotiation, as I was informed by Mr. Avery, the German Agent had advised Mr. Avery that Theodor Wille would sign the releases if they got $100,000 and that the Zentral Einkaufsgesellschaft would contribute one-half of that amount if the claimants would contribute the other half."

This deponent assumes that the above statement is made by Mr. Judd in answer to the statement found on
2627 pages 13 to 14 of this deponent's main affidavit to the effect that the Memorial filed before the Mixed Claims Commission, List No. 6207, Docket No. 8304 (a copy of which is attached to the affidavit of Mr. Selden Bacon as Exhibit B), included therein an item of $177,104.48 which represented one half of the loss charged to Theodor Wille by Crossman & Sielcken on the cargoes which were seized and condemned by the British Naval Authorities and which cargoes were the subject matter of the instant suit in the United States District Court for the Southern District of New York.

In view of Mr. Judd's disclaimer in his affidavit of any
2628 knowledge of a claim by the firm of Theodor Wille to the effect that it had "any interest whatever in any sum that might be recovered" on account of the seized cargoes (page 2) this deponent calls attention to the Memorial above mentioned, filed with the Mixed Claims Commission on November 3, 1927, and sworn to and signed by Mr. Judd on October 26, 1927.

As an Exhibit to this Memorial (marked Exhibit 7, Schedule 5, page 3), there was filed with the Commission a copy of the dollar account "due Crossman & Sielcken from Theodore Wille," identified as "Reference Brazil Ledger J402-K 390," in which Theodor Wille is charged, under an item dated September 30, 1917, with "Half loss on Copenhagen cargoes" to the extent of $177,104.48. A copy of this account is hereto annexed and marked Exhibit 2.

Paragraph 14 (h) of this Memorial (attached as Exhibit B to Mr. Selden Bacon's affidavit) shows:

> "Due Crossman & Sielcken from Theodor Wille (Dollar Account) on Oct. 8, 1917, plus and minus appropriate debits and credits to July 2, 1921 (Ledger J. 402-K. 390) Exhibits 3 and 7, Schedules 5, 5-a, 5-b, 5-c) $296,950.00"

Paragraph 14 (i) of this Memorial shows an item due 2630
Theodore Wille from Crossman & Sielcken of $192,901.51 and a net balance due Crossman & Sielcken of $104,048.49.

And in the Brief submitted before the Mixed Claims Commission in support of this Memorial which Brief was signed by Messrs. Brainard Avery, Charles D. Hamel, R. S. Doyle, Jay E. Whiting and Earl B. Barnes, the following explanation of the above items is given on pages 48 and 49 thereof

> "There is included in this dollar account, as will be noted in Schedules 5 and 5-c of Claimant's Exhibit 7, the sum of $177,104.48 charged on the books of Crossman & Sielcken against Theodor Wille on 2631
> September 30, 1917, and representing one-half of the loss on Copenhagen cargoes shipped in 1915 and seized by the British Government, which loss is computed as follows:

'Feb.	27 per s/s	Hilding	$ 95,578.29
Mar.	23	Arkansas	48,686.81
"	30	Hellig Olav	28,105.99
Apr.	13	Gunborg	43,997.16
"	23	Indianic	53,471.41
"	28	Oscar II	83,625.87
			$353,465.53
May	26, Received for Cereals, S/S Oscar II		8,050.44
			$345,415.09

Add—Copenhagen Expenses paid by Theodor Wille	20,206.39	
Legal Fees London & N. Y.	14,533.47	
Interest to 9/30/17 at 5%	40,695.61	
	$420,850.56	
Less—Profits on (other) Cargoes	66,641.60	
2633	$354,208.96	
1/2 of $354,208.96 equals		$177,104.48'

"These are the same cargoes for which claim is made against Germany and the Zentral-Einkaufsgesellschaft in the Memorial for Claim pending before the Commission, List No. 636, Docket No. 8305. The total of that claim is for the following amounts plus interest:

"Amount of Invoice, Freight and insurance	$353,465.53
Amount of Commission	35,346.55
2634	$388,812.08
Less—Payment for Crackers and cereals on S/S Oscar II	8,050.44
Net Amount	$380,761.64

"In the event that the Commission allows in full the claim against Germany and the Zentral-Einkaufsgesellschaft as set up in the Memorial for Claim, List 636, Docket No. 8305, for $380,761.54 plus interest, the charge on this account against Wille (Schedule 5 of Claimant's Exhibit 7) in the amount of $177,104.48, representing cost of one-half the loss on Copenhagen cargoes, should be eliminated, and the respective accounts between the two firms adjusted accordingly."

The above extracts from the Memorial, from the exhibits to the Memorial and from the Brief filed in sup-

port thereof, clearly indicate that Mr. Judd and the Executor, as the claimant, must have been cognizant that the firm of Theodor Wille would unquestionably assert a claim for its interest in any recovery that might ever be made on account of the seized cargoes, since the Memorial signed by Mr. Judd contained full details of the charging against Wille, in favor of Crossman & Sielcken on its dollar account, of the item of $177,104.48 as being one half of the loss of these cargoes to be borne by Wille. It will be noted, also, that this Memorial included this charge against Wille on the "dollar account" claim in 2636
1927, which was several years after it was allegedly written off the books of Crossman & Sielcken.

Attention is invited to the affidavit of Mr. George E. Warren, sworn to on June 28, 1938. This deponent believes Mr. Warren to be under severe misapprehension as to a great many of the matters mentioned in his affidavit but this deponent considers it to be sufficient for the purposes of the present proceedings to answer only certain material statements which are contrary to the true facts, a correct presentation of which is essential to the issues presented by this Motion.

Such statements by Mr. Warren are 2637

> "No seizure of either the assets of the firm of Crossman & Sielcken or of the assets of Hermann Sielcken had been made by the Custodian. Nor had either said Sielcken or said firm been declared an enemy by the Custodian at any time prior to the death of said Hermann Sielcken (p. 5).
>
> "That * * * from the 25th day of January, 1918, the Trust Company ceased to hold the position of Agent for the Alien Property Custodian in holding possession of any assets of the firm of Crossman & Sielcken (p. 7).
>
> "Deponent further says that in the early part of the year 1918 there was considerable correspondence between the Trust Company, conducted on its part by deponent, and the representatives of the Alien Property Custodian and others, which very clearly

shows that at that time the property of the firm of Crossman & Sielcken and the property of said Hermann Sielcken was held by the executor of Hermann Sielcken and not by the Alien Property Custodian" (p. 7).

With reference to the above statements this deponent is unable to present a clearer and more comprehensive summation of the true facts regarding the seizure of the property here concerned by the Custodian after the determination by the various Government officials that
2639 the same was enemy owned, than that which appears in the brief submitted on behalf of the Irving Trust Company, as Executor of Sielcken's estate by Mr. Selden Bacon and Mr. Leonard Smith, filed in 1936 in the Surrogate's Court for New York County, before the Surrogate, in the Matter of the Estate of Hermann Sielcken. On page 41 of said brief, the following is stated

"AFFAIRS OF CROSSMAN & SIELCKEN IN 1917.

"In the meantime in this country as early as August 8th, 1917, the firm of Crossman & Sielcken was already by the American authorities regarded with
2640 suspicion as pro-German on account of Sielcken; and they at once proceeded to halt the firm's activities (S. M. pp. 3533-5, 4529, 4536). At that time the War Intelligence Board interfered markedly with the export business of Crossman & Sielcken by delaying issuing licenses to them for export, by which licenses alone their export business could be conducted (S. M. pp. 4535-6). For a short time this was confined to constant delay; but beginning in late August, 1917, or early in September *all* such licenses to that firm were refused (Ex. 10456, p. 3).

"On a further consultation with Mr. Paul Fuller of the War Trade Board, of which the War Intelligence Bureau was a part, it was suggested that if Nielsen and Sorenson would get the enemy interest of Sielcken out of the firm in some way, the War Trade Board would allow them to go on with the ex-

port business, and, apparently, ship the goods which Crossman & Sielcken had already ordered and which were accumulating on the wharves in New York.

"Nielsen came back to New York. He sought advice from Mr. Eugene Smith, who had for years been Sielcken's personal attorney. But Mr. Smith answered that he had no authority to speak for Sielcken in the matter. Not knowing to whom else to turn, Nielsen then inquired of Mr. King for the name of someone he could wisely consult with. King recommended Cornell. Nielsen and Sorenson went 2642
to see him on September 22 (S. M. p. 3460; Ex. 585, Entry of Sept. 22, 1917). The upshot of the conference was that Cornell then advised that the partnership had been brought to an end by the war (S. M. pp. 2371-2, 2429) and that it would be well for Sorenson and Nielsen to organize a new partnership in their own names, meantime proceeding to liquidate the affairs of Crossman & Sielcken. Nielsen and Sorenson acted at once on this advice and formed the firm of Sorenson & Nielsen, which, as far as possible, took over at cost the accumulated and accumulating goods which Crossman & Sielcken had ordered (on commission) for foreign houses and proceeded 2643
to get licenses to export them (S. M. pp. 3536-3539).

"The Trading with the Enemy Act went into effect on October 6, 1917. Two days later unknown to anyone here, Sielcken died in Baden Baden. Immediately afterwards Mr. A. Mitchell Palmer was appointed Alien Property Custodian.

"As we all know, the provisions of the Trading With the Enemy Act made anyone residing in Germany an alien enemy, irrespective of nationality, and required prompt and full reports of property of any such enemies to the Custodian.

"Under date of November 7th, 1917, Nielsen and Sorenson reported the situation as fully as they knew how to the Custodian (Ex. RR), and in the hope of gaining favor with the Custodian deposited $100,000 firm funds with him, which was immediately invested

2644 *Reply Affidavit of Frank C. Sterck*

by him in Liberty Bonds. This trust was Trust No. 1 of the Alien Property Custodian's office (Exs. D and U).

"Nielsen and Sorenson succeeded in getting various permits from the War Trade Board and finally, on November 16, 1917, the War Trade Board issued to them a permit to continue to do the business, of Crossman & Sielcken.

'as may be necessary for the sale, liquidation and disposition of the interest of the said Herman Si-
2645 elcken in the business, assets and property of the said firm of Crossman & Sielcken' (Ex. F).

That license, however, contained the following conditions:

"1st. That liquidation should be carried out under the supervision of Arthur Young & Company, as Certified Public Accountants, and under such additional supervision and in accordance with such plan and method as might be desired by the Alien Property Custodian; and that all expenses of such supervision should be paid as part of the expenses incidental to the liquidation;

2646 "2nd. That the licensees should turn over to the Alien Property Custodian the share of the 'enemy partner' in that firm (Sielcken) of such proceeds of the liquidation, either at its termination or from time to time during its course, as the Custodian should desire;

"'3rd. That the progress of the liquidation should be reported to the Alien Property Custodian and the War Trade Board monthly, or oftener if required; and

"'4. That the license was revocable and subject to amendment in the discretion of the War Trade Board.'

"APPOINTMENT OF THE TRUST CO. BY THE ALIEN PROPERTY CUSTODIAN.

"In the exercise of this supervision, the Alien Property Custodian, on November 30, 1917, appointed the Columbia Trust Company as his agent to represent him in that liquidation. In that letter (Ex. B of Answer of the Irving Trust Company; Ex. H in evidence), the Custodian notified the Columbia Trust Company;

"'All of the expenses of supervising the liquidation are proper charges against the trust, as you will see by the license. I shall be glad to talk over with you the amount of your compensation after you have had an opportunity to acquaint yourself with the details.' 2648

"Besides other details, he added:

"'There should be prepared immediately a statement of the assets and liabilities as of close of business this date, so that there may be had a statement showing the assets that I may be charged with the supervision of, which will be a basis of the Alien Property Custodian to account from to the enemy partners. 2649

"'In order that the Custodian may be in a position to properly account for the assets and justify the liquidation, all of the books, papers and records of this Company must be retained and finally placed in storage, so that access may be had to them at the time of the accounting at the close of the war.

"'Will you please see that this is done' (Ex. H).

"At the time of receiving this letter from the Custodian, the Trust Company had received a rumor, as yet unconfirmed, that Sielcken had died; and the Trust Company's President, Mr. King, knew that it was named as executor in Sielcken's will.

"The Trust Company accepted the appointment and as a very first step took into its own possession,

as representative of the Custodian, all the securities held by the firm; changed the combination on the firm's safe to one known only to itself; and had the principal account books of the corporation locked up in that safe nightly.

"The Trust Company acted under this appointment until January 23, 1918, a matter of nearly eight weeks.

"APPOINTMENT OF THE TRUST CO. AS TEMPORARY ADMINISTRATOR, PROBATE OF THE WILL, AND GAINING POSSESSION OF THE ASSETS.

"About the 14th of December, 1917, confirmation was received of the death of Sielcken (Exs. 10120, p. 6 aff. of Pet'r 10421). The Trust Company then secured the will from Nielsen, who had had possession of it (S. M. pp. 3672-3) and employed Eugene Smith to present the will for probate.

"It was deemed important to get the property out of the hands of the Alien Property Custodian at once, if possible, and an application was immediately made for the appointment of the Columbia Trust Company as temporary administrator of Sielcken's estate.

"The decision of this Court to appoint the Trust Company as temporary administrator was filed on December 26, 1917, and the same day Mr. Warren, on behalf of the Trust Company, wrote to the Alien Property Custodian suggesting that as the executor was not an enemy the entire property of Crossman & Sielcken ought to be turned over to it as temporary administrator (and subsequently as executor) for administration (Ex. 246).

"Meantime, the Alien Property Custodian had authorized a settlement with Sorenson and Nielsen at about $120,000 apiece for their shares of the profits of Crossman & Sielcken, as provided by the copartnership articles, and that settlement was concluded on the 27th day of December, 1917.

"On January 3, 1918, the Alien Property Custodian's representatives, Mr. Bower and Mr. Mann, were disposed to approve the turning over of the estate to the administrator (and executor) (Ex. 10381). On January 9, 1918, this was approved by the Alien Property Custodian in person in conference with nine of his assistants (Ex. 247), and on January 14, 1918, Mr. Bower, the Custodian's general business manager, wrote to the Trust Company, authorizing it to take possession of all the assets of Hermann Sielcken as of the date of his death, 2654
as administrator (and executor) to account for them thereafter in due course of administration, adding, however:

"'It will, however, be necessary for you to obtain a license from the War Trade Board authorizing you to take over and manage the estate of said Sielcken as such administrator and executor.

"'A statement of the assets and liabilities of the firm of Crossman & Sielcken as of September 30, 1917, was prepared by Arthur Young & Co. under the direction of this Department, which statement, for the purposes of liquidation is satisfactory to this Department. This statement is 2655
to be continued down to October 8, 1917, the date of Mr. Sielcken's death, for the purpose of establishing the value of the estate taken over by you.

"'The settlement made with the surviving partners, whose interest terminated upon the dissolution of the firm, is approved.' (Ex. F of Answer of Irving Trust Company; Ex. J. in evidence.)

"The required permission from the War Trade Board was issued January 21, 1918, and reached the Trust Company on the 23rd of January, 1918. One of the conditions of that license was

"'That any money or property now or hereafter held by said licensee, which any "enemy" or "ally of enemy" would at any time or times be

entitled to receive if he were not an "enemy" or "ally of enemy" shall, at such time or times, either upon or without demand therefor, be conveyed, transferred, assigned, delivered, and paid over to the Alien Property Custodian whether or not so required by the President or by the Alien Property Custodian.' (Ex. G of Answer of Irving Trust Company; Ex. G in evidence.).

"Upon receipt of this license perfecting the authorization to take the property as temporary ad-
2657 ministrator, the Trust Company as administrator took over the property of Crossman & Sielcken at once.

"The fee for the Trust Company's services as representative of the Alien Property Custodian from November 30, 1917, to January 23, 1918, was fixed by agreement with the Alien Property Custodian at $7500 (S. M. 5122) and was promptly paid to the Columbia Trust Company out of the assets of Crossman & Sielcken on January 25, 1918 (Ex. 10493, S. M. pp. 5098-9).

"CONDITION OF THE FIRM ASSETS 1917-1919.

2658 "The situation of the firm owing to the war conditions had been very serious. During the refusal of the licenses by the War Trade Board, nearly $300,000 of goods adapted only to foreign markets, for which they had been specifically ordered, had been piling up on the piers in New York. And more were coming (S. M. pp. 3536-3538). Upwards of $890,000 was owing to the firm from concerns in hostile countries (Ex. 15, Sched. 1, p. 4) and about $1,716,000 from concerns in allied or neutral countries (Ex. 15, Sched. 1, p. 4) with whom the firm was permitted to communicate only under permits from the War Trade Board.

"There were a number of large claims against the estate. There were also about a quarter of a million dollars in the way of claims by the estate

which were contested by the debtors. Still other claims were doubtful.

"Within a month after the executor went into possession of the property the Alien Property Custodian, in person, demanded of Mr. Warren that they proceed to sell all the Woolson Spice stock (which constituted the largest single item of assets) without delay, as enemy-owned, saying the government desired to wipe out these enemy holdings in American corporations (S. M. pp. 4621, 4624-5, 4967-8).

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"Under the extraordinary circumstances and in view of the extraordinary complexity of the estate, the executor, in the face of the war conditions, had in 1919 made a marked success in realizing out of the stranded wreck of this once prosperous business.

"It had by tact and skill gotten the administration of the firm assets out of the hands of the Custodian, who had actually seized them, and so avoided the possibility of sacrifice of the assets thereby. Despite the war conditions the executor had succeeded in realizing well over $450,000 on the $892,091.53 owing to the firm from enemies (Ex. 15, Sched. 2, p. 3). * * *.

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"In October, 1918, the Alien Property Custodian had served a formal demand, dated September, 1917, on the executor for all the interests in the estate of Mrs. Sielcken and of the German executors and all other German legatees under the will, declaring them each enemies and so vested himself with all their rights (Ex. D). Prior to that service the Custodian's claim thereto was fully protected alike by the injunction in the decree admitting the will to probate, referred to in the letters testamentary (Ex. 10097) and by the conditions of the licenses from the War Trade Board. * * *

"'You will be glad to know, that in spite of the many complicated situations that confronted us in administrating his estate, we feel that the

result has been highly satisfactory. The conditions that existed during the war of course made it impossible for us to feel certain what course should best be pursued in liquidating the estate, but you may be sure that we gave to every item the most careful consideration.

"'As you no doubt know, the Alien Property Custodian served notice on us that the entire estate came under his jurisdiction, and that we should be required to account to him' (Ex. 180).

2663 "In late June, 1919, the text of The Versailles Treaty, which Mr. Wilson had signed on behalf of the United States, was published in New York. Among the terms of that treaty were provisions for the permanent retention by the United States of all property of enemies seized by the Custodian (*Vide* Ex. 91).

"The petitioner was, as matters then stood, unquestionably an enemy within the terms of the Trading with the Enemy Act."

(By petitioner Mr. Bacon refers to Clara Sielcken, widow of Hermann Sielcken.)

2664 In the affidavit of Selden Bacon, Esq., dated the 12th day of August, 1938, filed herein, Mr. Bacon states, on page 3:

"Until the present motion was noticed, the deponent never had occasion to inquire into the exact nature and details of the compromise agreement under which such payments were made."

And further, on page 4:

"And it is only since the present motion was first noticed by the United States that the deponent has been able to inquire of them into the very complicated details of the prosecution and settlement of those Memorials and of this suit."

In the "Brief for Irving Trust Company as Executor of Hermann Sielcken, Deceased," filed in February, 1936,

in the Surrogate's Court, New York County, in the Matter of the Estate of Hermann Sielcken, Mr. Selden Bacon and Leonard B. Smith, Esq., Attorneys for the Irving Trust Company as said Executor, make the following statement, in reference to the instant suit and the claim for $1,000,000 before the Mixed Claims Commission, United States and Germany, at page 223 thereof:

"The abandoned allegations of the petition are emphatic proof of the extent to which Avery exercised his imagination. In particular we may notice the allegations as to the $1,000,000 remittances of 2666
1916. The theory that those remained firm assets was flatly contradicted by the very documents he asserted gave him the idea (Exs. 10092, 10117).

"The petitioner herself had repeatedly sworn that the contention was untrue (Exs. 10093, 10094, 10210), and had herself taken the proceeds of those remittances as individual German assets of Sielcken, with which neither the firm nor the American executor had anything to do (S. M., pp. 3033-4). The whole matter of the assertion of that claim before the mixed claims commission and its compromise was avowedly conducted by Avery and the petitioner (Amended Petition, pp. 38-9). And he had found the German 2667
Government quite ready to agree to a compromise which cost it nothing and gave to the German Government out of the United States Treasury over $300,000 of cash of Z. E. G., a German governmental subsidiary, which the United States had seized and held."

In the same brief, at page 176, an elaborate explanation of the theory upon which Mr. Brainard Avery filed a claim before the Mixed Claims Commission for $1,000,000, as an asset of the firm of Crossman & Sielcken, is given as follows:

"a) The Story Told Up To 1927.

"In the fall of 1919 and the first months of 1920 Mrs. Sielcken was, of course, very anxious to get

into the good graces of the American Government so as to induce a voluntary return of her own property and her share of this estate to her, by the Alien Property Custodian without formal application (S. M., pp. 5326-7). It was while she was urging such a voluntary return that she became an important witness for the Government in the prosecution of Rumely.

"We have already seen how Sielcken in 1915 received a personal legacy from George W. Crossman of $1,000,000 which was credited to him on the firm books at the time, and that, in late 1916, he had the firm send the $1,000,000 to Wille for him, and that it was credited to his personal account with Wille and invested in German war bonds which he and the petitioner took, and which appeared on the books of Crossman & Sielcken as a withdrawal by him of so much capital from the firm.

"In that *Rumely* case she was examined beforehand by the Assistant District Attorney, Mr. Harper, and then made affidavit about these $1,000,000 remittances as follows:

> "'It is my understanding that the large amount of money which my husband had sent to him in (from) New York and which he invested in German Government bonds was substantially a legacy of $1,000,000 which he received as a legatee under the will of his partner, Mr. Crossman, and after the payment of this legacy, this money at my husband's suggestion was sent over to him and invested in these bonds and we lived on the interest of them.' (S. M., pp. 2914-2915.)

"At the trial of the *Rumely* case she testified more specifically as follows:

> "'At that time (September, 1916) Mr. Sielcken had two bank accounts in Germany. One bank account was the firm of Theodor Wille, in Hamburg, and one Bank account in Baden-Baden, the Rhein-

ische Credit Bank. The account at the Rheinische Credit Bank in Baden-Baden was used for the purpose of expenses of the estate. That is the expense of our living at the House Eden, the maintenance of our establishment there. The balance carried was sufficient to meet that from time to time. It was sent over by check from Theodor Wille, to the Rheinische Credit Bank. My husband had an account with Theodor Wille at Hamburg. I do not remember what the largest amount was that was deposited in that account. Other than those bank accounts, he had no property in Germany that I know of before 1916, in the spring. He sent some money from his office here and invested it in Germany. In 1915, so far as I knew, Mr. Sielcken had no property in Germany, other than those two bank accounts. During 1916, Mr. Sielcken sent over for some money to purchase bonds. I knew about it. I am the residuary legatee of Mr. Sielcken's will. I have those bonds today. They are in Hamburg, in the Discounto Bank, under the care of Theodor Wille. Those are bonds that were purchased with a million dollars that was sent over from Crossman & Sielcken in New York. Those bonds have never been pledged to anybody. I think they were purchased in the spring of 1916. Up to the time of the purchase of those bonds, the only property that Mr. Sielcken had in Germany were those two bank accounts.' (Ex. 10210 for Id., p. 5.)

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"She further there testified:

"'These bonds that he purchased in 1916, the German Government bonds, with the million dollars; I did not come into possession of those until after Mr. Sielcken passed away. *They were his individual property from the time he purchased them until after his demise.*' (Italics ours.) *Ibid,* page 8.

"And again, the following day, she added:

"'Q. You testified yesterday, Mrs. Sielcken, with respect to one million dollars which, at Mr. Sielcken's request, was remitted to him by the firm of Crossman-Sielcken, and which was invested in bonds of the German Empire. Do you know for what purpose the income of those bonds were used? A. Yes, sir.

"'Mr. Steuer: I object to that as immaterial.

"'The Court: Overruled.

"'Mr. Steuer: I except.

"'The Witness: For what purpose was the income of those bonds used?

"'Q. Yes. A. *The income of those bonds were used for our living over there. Mr. Sielcken had no property in Germany—investing this million dollars which he had from Mr. Crossman over there to have an income, and to be able to pay the expenses, which we were always drawing,* as we stayed over there longer. We only used to stay two or three months before that time. That is why he invested that money over there in bonds, and I am still paying from it over there.

"'The income on those bonds was remitted from Hamburg and that was expended as we needed it from time to time for our living expenses in House Eden.'

"*Ibid,* pages 4-5.

"At the time of giving this testimony Mrs. Sielcken was quite clear that that $1,000,000 was the Crossman legacy. She was positive that, when sent to Sielcken, it was *his individual* property; that it was put in *his personal bank account;* that the bonds bought with it were *his individual* property; that he got the $1,000,000 sent over to him so *he* should have funds in Germany to pay his personal expenses; that the income from the bonds was used for those pur-

poses, first by him, and then by her; and that she later got the bonds herself and then still held them.

"In February, 1921, she in substance repeated this story in connection with her efforts to reduce the Federal Estate tax on the estate, making affidavit as follows:

"'The only personal property left by said decedent (Hermann Sielcken) in Germany, or elsewhere outside of the United States, to the best of my knowledge, information and belief, was the following: 2678

"'German Government Bonds	5,432,000M.	
Less loan from Theodor Wille, Hamburg	200,000	5,232,000M.
"'Loan to M. Moller, Altona, Germany		100,000
Household furniture and personal effects		400,000
Total		5,732,000M.

"'The foregoing valuations are in German marks. The par value of the German Government bonds was 6,790,000 Marks, but at the time of Mr. Sielcken's death their market value was about 80%, or 5,432,000 marks.' (Ex. 10093.) 2679

"This was supplemented by further affidavit of May 18, 1921, as to the value of Mariahalden. (Ex. BB.)

"Mrs. Sielcken claimed in the first of these two affidavits that the Mark should be figured at nine cents. The Revenue Bureau figured the Mark at 14 12/100 cents. And on the sum, so ascertained, as the value of Sielcken's German estate, to wit, $1,171,771.74 based a rebate of $113,294.34, representing the tax paid on a proportionate part of the estate's indebtedness (Ex. CC).

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"No estate tax or transfer tax was imposed on these foreign assets, *because Sielcken was a non-resident.*

"The importance to her of showing that he was domiciled in New York had largely disappeared for her immediate purposes, when she secured the California decree of January 6, 1921, establishing a record of Sielcken's naturalization (Ex. 10120—paper 1) and when in April, 1921, the Alien Property Custodian surrendered his claim. The saving in Estate and Transfer taxes she accomplished by the shift in
2681 her representations was over $110,000.

"The material feature of this situation is: That if these 1916 remittances remained *firm* assets of Crossman & Sielcken, they belonged to the Trust Company as executor, and were subject to both estate and transfer taxes here. Whereas, if they were *individual* assets and *not* firm assets, and he died domiciled in Germany, these bonds did not pass to the American executor, which was executor only of the American assets (which necessarily included the entire interest in Crossman & Sielcken), and were not subject to either Estate or Transfer taxes here.

2682 "These 1921 affidavits, by which a rebate of $113,294.34 was secured from the *Estate* tax alone, (See Exs. 10218, CC), were thus direct representations by her:

"a) That Sielcken died domiciled in Germany;

"b) That the $1,000,000 remittances of 1916, became, on remittance to Wille for him, Sielcken's *individual* property and were *not* firm assets.

"The books of Crossman & Sielcken showed the receipt, for Sielcken's account of the Crossman legacy under date of January 15, 1915, in the sum of $1,100,000 (Ex. 10092).

"This legacy from Crossman, by the terms of the partnership articles (Amended Petition, p. 68), was clearly not a part of the capital of the 1913 firm of Crossman & Sielcken, but was merely a personal

credit to Sielcken, on the firm's general account with him.

"When the $1,000,000 was remitted to him in the fall of 1916, the remittances were charged against him in that same account (Ex. 10092).

"These remittances, when received by Theodor Wille, were *not* credited to the firm of Crossman & Sielcken but to the *personal* bank account of Sielcken with Theodor Wille (Exs. 8 and 10120—paper 15, p. 3).

"That personal bank account of Sielcken's did *not* 2684
appear on the books of Crossman & Sielcken as a firm account. There was nothing on the books here relating to his personal transactions with Wille (Ex. 10090).

"If that personal account of Sielcken's with Theodor Wille had been a *firm* account, all receipts on it would have had to be credited to the firm, including the $1,000,000 remittances, the interest on the eight million marks of bonds, and the 4,000,000 marks of other receipts thereon. And all Sielcken's withdrawals from it, consisting of his entire household expenses in Germany and other matters aggregating about 5,600,000 Marks would have had to be charged 2685
to Sielcken on the firm books of Crossman & Sielcken. The results of such entries would obviously have been disastrous to the petitioner's claim that Sorenson and Nielsen had been overpaid; for (even omitting from that calculation the item of increment of value of securities), their shares of the profits would in that case have been far larger than the sums actually paid them.

"But there were no entries on the books or papers in the files of Crossman & Sielcken even tending to show anything about what Sielcken did with this money after it was sent to him and charged against his balance of capital in the firm (Ex. 10090). And he and the petitioner used it, and she took the bonds bought with it, as individual property of Sielcken's not belonging to the firm.

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"Mr. Avery claimed (S. M., pp. 1748, 1814) that there had been delivered to him by Sorenson in 1927, papers which showed that the withdrawal of the $1,000,000 in the fall of 1916 had *not* been charged up to Sielcken as a withdrawal of the sum by him from the firm assets. He was immediately called upon to produce all such papers (S. M., p. 1749). Every paper he so produced was put in evidence (Exs. 10103-10119, 10124-10126). In no one of them was there the slightest indication to support his statement. The books of the firm showed the direct charge of the
2687 amount against Sielcken's personal account, and no suggestion of any credit to the firm against *any* person for the sums so remitted.

"Finally, Mr. Avery produced Exhibit 10117, a balance sheet as of December 31, 1916, which he said was one of the papers so delivered to him by Sorenson, in which document it was stated *expressly* that Sielcken's net withdrawals of $1,012,410.03 in 1916, (which included the $1,000,000 remittances of that fall) had reduced Sielcken's 'capital' in the firm to $4,853,183.65, which was further reduced by the loss for the year 1916 of $96,422.36, to $4,756,761.29 (Ex.
2688 10117).

"*Instead of supporting his statement on the stand, the books and papers delivered to him flatly contradicted his statement.*

"Up to Avery's connection with the case Mrs. Sielcken had consistently maintained that the German bonds in which this $1,000,000 had been invested were Sielcken's individual property, and not that of the firm, and *therefore* not property within the United States, to which our Estate and Transfer Tax laws were applicable and by this contention had avoided both Estate and Transfer Taxes on that asset, which, at the time of his death, was worth, according to the Federal Tax Bureau $1,171,771.74 (Ex. CC). The Estate and Transfer taxes on that additional amount of American estate would have amounted to about

$140,000. These she escaped on the strength of her affidavit on those contentions. She had also taken the bonds bought with these remittances as *individual* property of Sielcken's, and used them for her own purposes (Ex. 10094 for Id. S. M. pp. 2914-2915), and had never mentioned them to the American Executor (S. M., pp. 3033-3034).

"Mr. Avery cabled his partner Mr. Castell on July 28, 1927:

"'Three We are maturing new theory viz. One, 1913 articles partnership Sielcke tracted to 2690.
supply definite capital. Partnership duly terminated Sielcken's death. Two. All money sent Sielcken including million fall 1916 charged his account here. He did not withdraw capital merely debit charge. Three All moneys possession Wille Hamburg at Sielcken's death were partnership funds subject accounting between partnership Sielcken. This Wille partners knew. Four. German executors Sielcken estate had no jurisdiction money credits securities Wille's possession because they belonged liquidators New York subject articles partnership liquidation partnership payment Columbia Trust as New York Executor. See Sielcken's will. Stop. Had German Executors taken 2691
possession Wille account prematurely both they Wille probably responsible to liquidators. Five. Martin advises under these circumstances probably German war legislation responsible for loss at sixteen cents mark. Claimants here Columbia Trust Sorenson sole liquidator. Six. Can you ascertain Sielcken records amount his personal balances Wille time of death. Seven. Probably no record here transactions between Wille Sielcken personally * * *' (Ex. 10090).

"It *was* an entirely *new* theory, and contradicted flatly by the books and records here, as well as by the testimony and affidavits of Mrs. Sielcken by which

she had escaped Estate and Transfer taxes aggregating over $110,000 and by her own dealings with those bonds and with the personal bank account of Hermann Sielcken (Ex. 10120, Docs. 15-18).

"The tax matter had been fully settled and disposed of in her favor by 1923.

"In 1927 Mrs. Sielcken, under Avery's guidance, proceeds to assert before the Mixed Claims Commission, that all these German War bonds purchased with the $1,000,000 remittances of 1916 belonged to *the firm* of Crossman & Sielcken, and *not* to Sielcken
2693 individually, and that Sielcken was domiciled all the time in New York.

"It was another complete *volte-face.* And Mrs. Sielcken bore her part in it. She made affidavit, on September 16, 1927, to support this claim as follows:

" 'When diplomatic relations between the United States and Germany were severed in February, 1917, both my husband, Hermann Sielcken, and I experienced much anxiety regarding our property interests in Germany. * * *

" 'After the funeral, on October 11th (1919), at Baden-Baden, there was a meeting, at the Villa
2694 Eden, which I had rented, as Mariahalden was not suitable as a residence during Mr. Sielcken's illness. At this meeting there were present myself, Mr. Gustav Diederichsen, Mr. Georg Georgius, my brothers Carl and Richard, Dr. Kammerer and my son, Alex. * * * At this meeting the question then arose as to what was Mr. Sielcken's estate in Germany. We all knew that his principal interests were in the firm of Crossman & Sielcken in New York. He had only a few unpaid bills in Germany—no debts except the large accounts of Crossman & Sielcken on the books of Theodor Wille at Hamburg. * * *

" 'Dr. Kammerer said the executors need not concern themselves about my husband's real estate. The only land he possessed in Germany was Mariahalden * * *.

"'He had a current bank account, at the Rheinische Credit Bank at Baden-Baden. I do not think he had any assets, or property anywhere else, except the large account with Wille, in which he was interested. * * * Mr. Diederichsen explained the account which was on the books of Theodor Wille in the name of Hermann Sielcken. He told us that this was a general account between his firm (Wille), Crossman & Sielcken and Mr. Sielcken; that Mr. Sielcken owned all the capital invested in Crossman & Sielcken; that the property with Wille was capital of Crossman & Sielcken, but that it was also subject to the debts of Crossman & Sielcken. * * *

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"'Reverting again to the meeting of the executors and myself at Baden-Baden following Mr. Sielcken's funeral, 1917, the executors decided not to take possession of the money and bonds and assets with Theodor Wille, at Hamburg. They told me this property was part of the Crossman & Sielcken capital, and subject to the liquidation of that firm (the firm had to be liquidated by Mr. Sorenson and Mr. Nielsen on Mr. Sielcken's death. This was provided for in his wills) and although I was interested in whatever remained of Mr. Sielcken's estate, after debts and taxes were paid, they decided to take no possession nor jurisdiction of the property with Wille, at Hamburg. And they never did. This decision was never changed, nor was there any later discussion as to changing it.'

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"(Paper 2 of Ex. 10120, pp. 1, 3, 4, 5, 8-9.)

"This affidavit was filed in the Mixed Claims Commission proceeding conducted by her, of which a compromise was subsequently arranged by Mr. Avery in 1930."

Mr. Bacon at the end of his affidavit says:

"deponent believes the account given by Mr. Avery in his affidavit herein, verified August 11, 1938, of

2698 *Reply Affidavit of Frank C. Sterck*

the situation in regard to that compromise to be correct.''

At page 301 of the brief before Walter Seligsberg as referee in the above-mentioned proceeding in the Surrogate's Court, Mr. Bacon and Mr. Smith state:

''*As to the Unreliability of the Testimony of Brainard Avery.*

''We desire simply to point out a few of the many matters concerning the conduct and testimony of this
2699 witness, and shall leave them without comment. They speak for themselves.

''Mr. Avery, in open court before the Surrogate, claimed credit for having personally drawn the amended petition, and appeared as counsel for the petitioner.

* * * * * * *

''b). *The $1,000,000 remittances of 1916.*

''We ask the Court to examine carefully his testimony and the allegations in the Wille Memorial of
2700 1927 (Ex. 7) and in the amended petition (p. 27) that the $1,000,000 remittances of 1916 were still firm assets after their receipt in Germany.

''In his cablegram of July 28, 1927 to Castell (Ex. 10090) he stated that this was a 'new theory' he was maturing, and that there was apparently nothing in the books or files here that showed anything about Sielcken's personal transactions with Wille.

''In the amended petition (p. 27) he had alleged in substance, and tried to support it on the stand, (S. M., pp. 1742-1751, 1756-1758, 1768, 1770, 1813-1816, 1822-1823, 1827-1828, 1838-1841, 2045-2048) that he got the information, that this $1,000,000 remained firm assets, from books and papers of Crossman & Sielcken furnished him by Sorenson, and that those papers and the books showed that that $1,000,000

never was charged against Sielcken's capital in the firm.

"The ledger account with Sielcken (Ex. 10092) specifically showed these remittances as withdrawals from Sielcken's balance with the firm Ex. 10117, (a firm balance sheet as of December 31, 1916), produced by Avery and identified by him as one of the papers received by him from Sorenson, which he saw at the time of sending his 'new theory' cablegram (Ex. 10090) (See S. M., p. 1814) and on which he based his statement that the books and papers of Crossman & Sielcken nowhere treated these remittances as withdrawals of capital by Sielcken, *expressly* stated that the 'capital' of Sielcken in the firm had been *reduced* during 1916 from $5,865,593.68 to $4,756,761.29; that this reduction was occasioned by losses during that year of $96,422.36 and by the amount of $1,012,410.03 *withdrawn* during that year by Hermann Sielcken. 2702

"The firm Ledger Account with Sielcken (Ex. 10092) during 1916, showed these $1,000,000 remittances of 1916 in their exact amount as withdrawals by Sielcken, $ 999,453.14

"It showed other small payments made for Sielcken's personal account of $ 18,081.51 2703

Total $1,017,534.65

'It showed receipts for his account of $5,059.89

and 64.73 5,124.62

"Leaving net withdrawals $1,012,410.03, coinciding exactly to the penny with the sum shown in the balance sheet so furnished Avery by Sorenson as 'Drawn 1916 by H. Sielcken $1,012,410.03.' and reducing the 'capital' of the firm accordingly (Ex. 10117).

"Mr. Avery declared, on the stand (S. M., pp. 1815-1816) that he didn't know whether these figures

on Exhibit 10117 corresponded with the figures on the ledger account for 1916 and included those remittances. It had been his business to know just that.

"These documents established completely and conclusively that Mr. Avery got no such information from the books of Crossman & Sielcken and from the papers from their files furnished him by Sorenson, as he had asserted. Those books and those papers established that the information so given him
2705 was directly to the contrary of what he had asserted. And the 'new theory' he was working up, that the $1,000,000 remittances of 1916 were still property of the firm and *not* Sielcken's individual withdrawals from his capital in the firm, was purely an invention of his own, contradicted by every document he had access to, including Sielcken's personal accounts in Germany showing what he did with that money and what, after Sielcken's death, Mrs. Sielcken did with the bonds purchased therewith and the income therefrom—documents of which he filed copies with the Mixed Claims Commission in connection with the Wille Memorial of 1927 (Ex. 10120). The whole
2706 story was a concoction of a *'new theory,'* which the papers in his possession showed him was absolutely untrue.

"c). *Of the 1917 Settlement with Sorenson and Nielsen.*

"Again Mr. Avery, within a month after entering judgment in favor of his client, that the settlement of 1917 with Sorenson and Nielsen for their share of the profits of Crossman & Sielcken was *a full and complete accord and satisfaction* with them, barring their claims for nearly a quarter of a million more —a finding requested by himself (Ex. B)—turns completely around, and, without an iota of additional evidence, attempts to assert in behalf of the same client, and against the same persons, that it was *not* such an accord and satisfaction as he had just

induced the Supreme Court to adjudge that it was; and to assert that his client, having availed herself of it to defeat Sorenson and Nielsen's claims for additional amounts, could now attack it to show that they were originally overpaid.

"After the Referee had ruled that Mrs. Sielcken was absolutely estopped by that judgment to question that accord and satisfaction the charge was withdrawn."

Referring to Mr. Bacon's statement on page 4 of his affidavit that only since the filing of the present motion 2708
has he been able to inquire into the details of the prosecution of this suit, attention is called to the surprising familiarity of Mr. Bacon with the facts relating to the status of John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, and their standing to maintain a suit as parties plaintiff for the purpose of recovering assets of the firm of Crossman & Sielcken. At page 187 of the said brief before the Surrogate, it is stated:

"A similar attitude was displayed by the petitioner in dealing with the Sorenson and Nielsen 1917 settlement. 2709

"In the Chase Bank suit she requested and got from the Referee, Mr. Wolff, the finding that the settlement of December, 1917, with Nielsen and Sorenson was *a complete accord and satisfaction of their claims to shares of the profits of Crossman & Sielcken* (Ex. B) sheltering herself thereby from claims appoximating $250,000. That judgment was entered on November 11th, 1933 (Ex. A) on motion of Avery & Whiting as attorneys for Clara Sielcken Schwarz.

"The ink is scarcely dry on that judgment, based on that finding which she had secured, entered by her own attorneys (Ex. A), before she turns around, using the same attorneys, and attempts to assert in this proceeding that that transaction *was not a complete accord and satisfaction of those claims and was not binding;* and to urge that the decree of July 8.

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1921 should be vacated so as to enable her to reclaim large sums from Nielsen and Sorenson, and also surcharge this Executor with heavy damages for having ratified that accord and satisfaction, which she had just asserted and found so useful.

"That is a similar shift of story to accommodate her new financial desires, and bears on the weight to be given to any testimony given by her.

"It is Mrs. Sielcken, who, contrary to the advice of her attorneys, decides on employing Stewart to

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try to get the value of the seized cargoes from the British Government on the ground that the seizure was improper because there was no German interest in the cargoes.

"On the other hand, she had in her possession in Baden-Baden, at the time, the long correspondence between Sielcken and the Reichs Einkauf Gesellschaft and its successor Z. E. G. (S. M., pp. 4306-16).

"She suppresses completely from the Columbia Trust Company all information on that subject. She, through her son and Avery, gets up in 1927 the idea of proceeding *against Z. E. G. and Germany,* through the Mixed Claims Commission and the suit in the

2712

District Court, to recover the price of those cargoes from the vendee. She and her son despatch Mr. Castell from New York to Europe to her files and those of Dr. Kammerer, to get these papers. And he finds them there galore (Ex. 10213, Documents Nos. 1-12 and accompanying affidavits of Castell).

"Castell wasn't sent on a 6000 mile trip on the bare chance that there *might possibly* be something there. Before Castell went, (but after Avery had been retained by her) young Sielcken on May 6, 1927, for the first time, reveals to Judd, that they *have reason to believe Z. E. G. was the purchaser* (Ex. JJJ). She had had ample reason to know that long before Stewart was employed.

"There had been litigation over it in Germany in 1918 (Ex. 10088) and Kammerer had represented the

German Executors in that litigation. Castell got some of those papers from Kaemmerer's files. S. M., p. 4308). How came he to look for them there? Is it credible that she knew nothing of litigation involving nearly half a million dollars, in which she was directly interested, which was conducted by her own attorney, though in the names of the four German executors, namely, her two brothers, Diederichsen, her chief adviser and confidant, and his partner Georgius? Or that they undertook to bind the estate to payments running into hundreds of thousands of dollars without her knowledge? Or that she nevertheless knew in 1927 where to send Castell to get those papers? 2714

"Even aside from all that, her own oral testimony indicates that *she* knew as far back as 1916 that Z. E. G. had been the purchaser (S. M., pp. 3279-3282).

"Unless she had known of the details of that transaction as early as 1916 how could she recall in 1935 that she heard Sielcken mention Z. E. G. to Nielsen in 1916 (S. M., pp. 3279-3282); or that she heard Nielsen in 1916 say to Sielcken that he had seen Jorgensen or Paulsen (S. M. pp. 3279-3282)? If she had not known the details of the transaction at the time, the names of Jorgensen and Paulsen, and even the name of Z. E. G. would have been mere names to her—not to be remembered as having been casually overheard nineteen years before, with no reference to why or in what connection they were used. The testimony she gave may well have been quite inaccurate, but none the less it is *her* testimony and it admits her knowledge of Z. E. G.'s interest in those cargoes, long years before the employment of Stewart. 2715

"That knowledge of hers may well explain why *she* was willing to go out and pay Stewart $10,000 plus $2,000 to his attorney in settlement of the Stewart action, which, as far as the executor was concerned, was clearly baseless.

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"She charged Nielsen *after he was dead,* with having known that Z. E. G. was the purchaser (S. M., p. 2997); but on being more closely questioned admitted that *all* he said was to ask her what about Z. E. G. but no details were mentioned (S. M., p. 2997). Later she said all she could recall that he said was that it was a pity the cargoes were seized. It made lots of trouble (S. M., pp. 3154-3155). Later, after several days, she asserted that Nielsen had asked her, in 1919, only whether Z. E. G. still existed (S. M., pp. 3283-3284). Sielcken's own contemporaneous letter of September 22, 1914 showed that he was extremely careful *not* to reveal to his partners anything about the connection of the Reichs Einkaufs Gesellschaft of Z. E. G. with the purchase of the seized cargoes (Ex. 10103).

2717

"After being forced to admit that her statement that Nielsen, in 1919, told her about Z. E. G. was incorrect, she, in 1935, asserted that she heard Nielsen, in 1916, discuss with Sielcken, both Z. E. G. and its agents Paulsen and Jorgensen, and heard Nielsen say he had been to see them (S. M., pp. 3279-3282), a curious time to recall such talks, distinctly reminiscent of Judge Sanborn's comment on the earlier and later stories of a witness similarly situated.

2718

"*Curtis* v. *Cutler,* 76 Fed. 16, 20-21.

"The attempt to foist this knowledge onto Nielsen after his death, over her own prior testimony, is also a most apt commentary on her laches in bringing this proceeding.

"The proofs of her double dealing in this particular matter are not as categorical as in the first three cases, but they are tolerably complete. It makes a fourth important instance of her representing one thing to gain one end, and of turning around later and making contrary representations to gain another."

The petition for intervention of the Irving Trust Company, as Executor of Hermann Sielcken, the affidavits filed herein by or on behalf of the Chase National Bank, as Ancillary Executor of the Estate of Thorleif S. B. Nielsen, and the affidavit filed herein by John S. Sorenson, show that neither John S. Sorenson nor Thorleif S. B. Nielsen, or his Ancillary Executor, received any of the moneys recovered from the United States in the instant suit. Exhibit A annexed to the affidavit of Mr. Bacon, being a copy of the Intermediate Account of Proceedings of the Executor, shows the disposition of the proceeds of the recoveries in the instant suit and before the Mixed 2720
Claims Commission, and at page 54 the knowledge of the interested parties that "*there was most serious question* whether it was not reversible error as to the right of Sorenson & Nielsen to maintain the suit as plaintiff."

The statements of Mr. Bacon and Mr. Smith in the same brief shed much light upon the status of Hermann Sielcken as an alleged citizen of the United States and as an enemy within the definition of the word "enemy" in the Trading with the Enemy Act, at page 11, wherein it is stated:

> "Hermann Sielcken, the decedent, was born in Hamburg, Germany, about 1840. He came to the 2721
> United States about 1870, lived for a few years in California, and then came to New York, where he became connected with the firm of W. H. Crossman & Bro. After some years W. H. Crossman died. A firm was formed under the name of Crossman & Sielcken, consisting of George W. Crossman and Hermann Sielcken, as substantially equal partners. This firm continued until January 15, 1913, when George W. Crossman died. Hermann Sielcken then continued the business of the firm alone, under the name Crossman & Sielcken, until June 2, 1913. Then a new firm was formed consisting of Hermann Sielcken, Thorleif S. B. Nielsen and John S. Sorenson under the articles of copartnership set out as Exhibit A of the Amended Petition. These dates in 1913 are important features of the case.

2722 *Reply Affidavit of Frank C. Sterck*

"Prior to the formation of that partnership of June 2, 1913, both Nielsen and Sorenson had, for many years, been important employees of Crossman & Sielcken, Nielsen chiefly in attending to their import business (S. M. p. 3752), and Sorenson chiefly as office manager, head of the bookkeeping department of the business and taking care of the financing (S. M. pp. 3666-3667).

"When the petitioner came to the United States in October, 1919, she asserted that Sielcken had been naturalized in California in 1875 as an American
2723 citizen, and had lost his citizenship papers in a shipwreck; but there was no record of any such naturalization to be found there (Ex. 439). And the Alien Property Custodian, until 1921, denied that Sielcken ever had been naturalized here."

And again at page 34 of said brief, where it is stated:

"SIELCKEN'S PERSONAL HISTORY AFTER JUNE 2, 1913.

"We return to *the story of* Sielcken's life after organizing his 1913 partnership.

"He left New York shortly afterwards for Ger-
2724 many and there in the following September (Ex. 10101) married the petitioner, who was, prior to her marriage to him, a German subject (Ex. 439, pp. 1 and 2).

"At that time, he apparently determined to take up his permanent domicile in Baden-Baden, Germany, for in the marriage certificate as well as in other subsequent German documents, he describes himself as both temporarily and permanently a resident of that city (Ex. 10101), where he owned a great establishment, named Mariahalden (See also Exs. 10095 B, paper L-1).

"Shortly after his marriage he came to New York with his wife and they spent the ensuing winter at his old suite at the Waldorf-Astoria, which he continued to retain.

"In the spring of 1914 he and his wife each executed wills here in New York. Her will of that date has not been found. But in *his* will, changing from his earlier wills (S. M. p. 1774) in which he had described himself as 'of New York,' he describes himself as 'of Baden-Baden,' and directs that his American estate be converted into cash by his American Executor, the Columbia Trust Company, and the proceeds remitted by it to his German executors—to be distributed by them in Germany *'under the laws and in the tribunals of Germany, my domicile'* (Amended Petition, Ex. B, p. 72, 1st par.). 2726

"Another clause of the will should be noted here, as the Referee has reported that he in this will named Sorenson and Nielsen 'to manage the firm business' (Report, p. 10). On the contrary the will directs that the Trust Company, his executor, 'should leave the management of the firm business *for liquidation,*' in their hands 'to the largest possible degree under the direct supervision of the said Trust Company' (Amended Petition, Ex. B, p. 72).

"He also, on the same page of the will, said:

> " 'It is my desire that the said Trust Company should engage as their attorney and legal counsel 2727 in the administration of the estate, Eugene Smith of the city of New York, who has been conversant with my personal affairs and those of my firm for the past thirty years' (ibid p. 72).

"Sielcken and his wife, immediately after executing these wills, sailed for Germany and he never thereafter returned to the United States.

"The following year, 1915, he received from the estate of George W. Crossman a bequest of $1,000,000. In late 1916 he had this $1,000,000 remitted to him in Germany and with it bought German War bonds (Exs. 10120, paper 15, 10095B, paper A.; S. M. pp. 2977-8).

"Shortly after his return to Germany, and but two weeks after the outbreak of the war between

Germany and France, Sielcken, on August 10, 1914, made formal application to be renaturalized as a German (Exs. 10207 and 10208). This application would seem to have been a complete abandonment of his naturalization as an American citizen, totally irrespective of his subsequent dropping of that application.

"Letter of Porter, Acting Sec'y. of State to Pendleton of Feb. 2, 1886;

"Letter of Sec'y. Olney to Uhl, of Dec. 21, 1896;

2729 "Opinion of Atty. Gen'l. Williams, 1873, 14 Op. 295, and other numerous authorities collated in 3 Moore's Digest of International Law, pp. 711-712 and 739-754.

"At the request of the German authorities he dropped this application 'because he could be of more use to Germany in the war as an American than as a German' (Ex. 10095-B, papers c, d, e, and l).

"The Bezirks-Amt, to which he had made this application, then entered the following curious order on it:

2730 "'There are no objections to the naturalization of the wholesale merchant, August Hermann Sielcken.

"'The naturalization, however, can only be granted—unless we issue an order to the contrary—if Sielcken submits a *further* application. No further communication to Sielcken is to be issued' (Ex. 10209 a and b).

"From then on he was very active in securing foodstuffs, and war material for Germany, and *was still continuing to assist Germany in this way after the United States entered the war* (Ex. 10095-B, papers d and d-1).

"By having these various facts as to Sielcken's active pro-Germanism and application for renaturalization as a German presented to the highest German authorities, by intimate friends of theirs, Sielcken

and his wife, as early as June 1917, secured complete exemption by the German Government from all restrictions on resident enemies in Germany (Ex. 10095 B, papers f 1 and g 1; S. M. p. 3208). The fact that this exemption was procured by such representations was known to the petitioner (Exs. 10095 B papers c-1, e-1; S. M. pp. 2919, 3170) who with that knowledge availed herself repeatedly of this exemption (S. M. pp. 2918, 2932, 2941).

"On March 20, 1917 (the day before the President of the United States called Congress in extra session 2732
to declare war against Germany) Sielcken wrote to his Hamburg bankers, Theodor Wille, (of which firm Gustav Diederichsen, one of the German executors named in his will was the senior member) the following extraordinary letter:

"Translation

"'Mariahalden, Baden-Baden,
"'March 20, 1917

"'Dear Mr. Diederichsen,

"'What you have written me with regard to Vorwerks' wish, communicated to me by Mr. Volcken's, that I should subscribe the war loan at his 2733
place, I would not have considered Vorwerks' transaction in this way.

"'In case I acquire more war loan, I ask you to take for my account, like the last time, one Million dollars or the amount in Marks, respectively. I ask you, therefore, if it is still time, to send the order over. The way it is done by my people, one cannot judge about it. (or one does not know what happened).

"'The last time, when I received a cable direct from New York and tried to answer from here I was not permitted to do so. I had to forward the telegram to Hamburg and after three weeks the Hamburg experts permitted me to dispatch the

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cable to my firm in New York. If it always takes so long one cannot depend on it. If therefore, it is possible, I ask you to wire to my firm with regard to the million dollars.

" 'I have no idea what the rates of exchange are at present, but I imagine the prices are very low.

" 'My wife liked the house of Amsincks. If we have not enough houses my wife can buy the Amsincks' house as an addition. It is to be hoped that she arrives here this evening, all fresh and well again. Unfortunately, she could not get a sleeping car.

2735

" 'I live again in my own house, no longer with Dengler, although I liked it there rather well.

" 'That Holland has to punish the Chinese for Germany is something new to me.

" 'With hearty greetings, I remain,

" 'Yours,

" '(Sgd) *HERMANN SIELCKEN.*'

"(Paper A-1 in Ex. 10095-B).

"We call particular attention to two features of this letter, the phrase *'if it is still time'* and the direction to invest the money in German War Bonds. The first of these shows his anticipation that war would be immediately declared by the United States, as it was but seventeen days later; and the second his intention to assist Germany in the war against the United States.

2736

"Theodor Wille cabled, as directed, in Sielcken's name, to Crossman & Sielcken to remit them $1,000,000 for his account (Ex. 10095-B, paper b). The cablegram was received on March 23, 1917. Obediently Sorenson immediately tried to buy German exchange but was able to buy only $172,500 worth (S. M. pp. 1749-50). But even this sum did not get through, and was returned to the firm six weeks later (Ex. 67).

"Mrs. Sielcken knew at the time of her husband's sending for his $1,000,000 (S. M. p. 2965).

"It is interesting to compare with these facts, an affidavit which the petitioner made in 1927, gotten up by herself and her son in Germany (S. M. p. 2962) and verified by her there (Ex. 10120, paper 2), and presented by her to the Mixed Claims Commission in support of her claims of constant loyalty to the United States, in which she says:

"'When diplomatic relations between the United States and Germany were severed in February 1917, 2738
both my husband, Hermann Sielcken, and I experienced much anxiety regarding our property interests in Germany.' (p. 1 of affidavit of petitioner in Ex. 10120).

Sielcken, however, did not confine his activities against the United States to this effort, but, *after the United States had entered the war,* although he had been unable to get this second $1,000,000 from the United States, he actually bought German War Bonds to the extent of 80,000 Marks in August and September 1917 (Ex. 16 of Ex. 10120).

"This act, if he were an American citizen, (as the 2739
petitioner has been constantly asserting since her arrival in New York in October, 1919), was clearly treasonable.

"Sielcken died shortly after giving this last convincing evidence of his support of Germany against the United States.

"In this connection we may point out, too, that the petitioner herself, later, in March 1918, at the time of the successful German drive toward Amiens against the French and English and a few American troops, herself subscribed for and purchased an additional 100,000 Marks of German War Bonds. (See paper 17 of Ex. 10120, item of March 30, 1918; and letter from Diederichsen to her of March 22, 1918, Ex. 10094 for Ident., extract received in evidence at S. M. pp. 2922-2923.)

"Later in 1918, after her husband's death, when the German Treuhänder sought to seize her own property and that of her husband's estate, on the ground that she was an American and an enemy of Germany, she had Diederichsen write to the German Treuhänder urging him not to do so because, as Diedrichsen wrote to the Treuhänder, with her approval and knowledge (S. M. pp. 2922-3):

"'Mr. Hermann Sielcken, owner of the firm of Crossman & Sielcken, in New York, for a number
2741 of years back, resided in summer in Baden-Baden and, *since his marriage in autumn 1913, resided permanently in Baden-Baden.* He was born in Hamburg, and, *after the outbreak of the war, he had already filed an application for the re-acquisition of his German citizenship, but did not press said application because, in view of the business transactions which he, as an American, had made with the German Empire in the interest of supplying Germany with food, it seemed to our authorities more desirable for him to retain his American citizenship for the time being.* The late Mr. Sielcken gave his own person and property, to the
2742 fullest extent, to German interests. As examples for his purely German feelings we may only mention, among other things, his substantial regular contributions to the War Emergency Committee ('War Help') and the Red Cross, the keeping-up of a hospital and a Maternity Home in Baden-Baden, as well as his donation of 1 Million Marks for the dependants of war veterans in Baden.

"'*Mrs Sielcken comes from an old German family and it was only through her marriage to Mr. Sielcken, in the autumn of 1913, that she lost her German citizenship. As a widow she can, therefore, at any time re-acquire her German citizenship* under the law of July 22, 1913, relating to citizenship, without having to go through the formalities otherwise prescribed, *and she intends to do so. Up*

to the present, she refrained from doing so in view of the very substantial property arising out of the estate of her late husband situate in the United States which came to her as sole heir and the realization and representation of which might in future be simplified by the fact that Mrs. Sielcken has as yet not given up her American citizenship.

"'Under these circumstances, we would ask, also in the name of Mrs. Sielcken, to refrain from any further measures with regard to her property.' (Italics ours.) (Ex. 10095-B, papers l and l-1.) 2744

"In response the Treuhänder wrote her withdrawing his claim to the property, adding

"'Only in case you should make an essential change in your property, kindly advise me thereof.' (Ex. 10095-B, papers m and m-1.)

"We shall see later what contrary representations she later made to the authorities here, when seeking to get her property back from the American Custodian and in other proceedings here.

"This renaturalization application of Sielcken's and his and the petitioner's pro-German activities during the war were unknown over here." 2745

Under the Trading with the Enemy Act a debt claimant must be "not an enemy or ally of an enemy." Assuming, *arguendo,* that Hermann Sielcken, though resident in Germany during the war, was nevertheless a loyal American citizen because of his detention there against his will, that fact would be immaterial in the case of a debt claim, and the *Stadtmuller* decision, to which reference is made in the affidavit of Mr. Avery on page 11 thereof, has no application. In any event, the status of Hermann Sielcken, upon the statement of Messrs. Bacon and Smith before the Surrogate, is shown beyond any doubt to be that of a person loyal to Germany alone. In this connection also, attention is called to a letter

to G. W. Kirkpatrick, one of the four Export Managers of Crossman & Sielcken, dated March 1, 1915, and written in Sielcken's own handwriting, a copy of which is hereto annexed and marked Exhibit 3, in which the following appears:

> "It is a pity we cannot ship Rubber or Copper as a good German I would run the risk on Rubber. I cannot ask the same of you. I would be willing to give any kind of an oath the same as I am willing to die for Germany."

2747 Included in the cargoes which were the subject matter of the instant suit, as shown on the books of Crossman & Sielcken, Brazil Ledgers, J710-K916, was the following item:

> "April 23, 1915, W. 19617 Ft. black walnut $5399.-48."

In the letter above referred to, Exhibit 3, the following paragraph is noted:

> "The inquiry about Walnut is for the largest factory of arms in Germany and will be still necessary after the war is over. The amount required is
2748 very large and they are willing to pay any price for prompt shipment."

There is, consequently, no merit whatsoever in any contention that Sielcken was a loyal American citizen or that "despite his being in Germany from April 6, 1917 until his death, Mr. Sielcken had not been an enemy." (Affidavit of Mr. Avery, page 11.)

With reference to Mr. Warren's statement on page 7 of his affidavit to the effect that early in 1918 the correspondence between the Trust Company and the Alien Property Custodian clearly showed that the property of Crossman & Sielcken and of Hermann Sielcken was *held* by the Trust Company as executor of Hermann Sielcken and *not* by the Alien Property Custodian, this deponent desires to point out that this statement does not represent the full story. The files of the Trust Company and those

of the Department of Justice clearly show *that such property was held by the executor, but that it was so held for the account of the Alien Property Custodian.* Attached hereto are copies of a number of letters clearly establishing that fact, most of which are signed by Mr. Warren himself. These letters should have been included in the group of nine letters attached to Mr. Warren's affidavit (marked Exhibit K thereof) in order to have presented the actual facts. This deponent therefore attaches such correspondence hereto, as a part hereof, marked Exhibit 4, 4-a to 4-w, inclusive.

2750

With further reference to the position of the Trust Company, acting as agent and depositary for the Alien Property Custodian, as well as executor for the estate of Hermann Sielcken, there are attached hereto and made a part hereof, photostats of copies of a Designation of Depositary, dated December 31, 1917, marked Exhibit 5; Designation of Depositary dated July 30, 1918, marked Exhibit 5-a; and a Bond of Depositary dated December 28, 1917, marked Exhibit 5-b. The first two of these were accepted by the Columbia Trust Company, and the latter was executed by it. There are also attached hereto and made a part hereof as Exhibits 5-c, 5-d and 5-e, three specific designations of depositary with reference to Hermann Sielcken, Hermann Sielcken, deceased, and the estate of Hermann Sielcken.

2751

Insofar as the statements of Mr. Warren are concerned which either directly deny or by inference question the seizure of the assets of the firm of Crossman & Sielcken or of the assets of Hermann Sielcken by the Alien Property Custodian or the purported return to the executor by the Custodian of such assets in the early part of January, 1918, there is attached hereto, made a part hereof and marked Exhibit 6, a photostatic copy of the original "Individual Trust Ledger, Alien Property Custodian, Washington, Trust No. 1, Account of enemy, Hermann Sielcken, Address, Baden-Baden, Germany." This ledger account shows clearly that the books of the Alien Property Custodian carried the Sielcken account

2752 *Reply Affidavit of Frank C. Sterck*

as late as April 16, 1921, and until the final payments were made under the various claims filed against Trust No. 1.

In view of the fact that the lower right-hand corner of the original Individual Trust Ledger sheet (Exhibit 6) has been worn off by time and usage, there is attached hereto, made a part hereof and marked Exhibit 6-a, a photostat of a typewritten copy of the original ledger sheet which includes the figures completing Exhibit 6. There are also attached hereto and made a
2753 part hereof, marked Exhibit 6-b and 6-c, photostatic copies of the "credit tickets" upon which the entries of October 26, 1917 in the amount of $100,000 and of $5,171,889.95 were based.

From the above mentioned Exhibits it is clear that Hermann Sielcken was at all times described on the books of the Alien Property Custodian as an enemy; that after his death became known his account was carried as an enemy account; that not only the $100,000 item, voluntarily sent in to the Custodian by Sorenson and Nielsen, was entered upon the seizure books, but that the interest of Hermann Sielcken in the copartnership of Crossman & Sielcken as per the report of Arthur
2754 Young & Co., in the amount of $5,171,889.95, was likewise placed on the seizure ledgers; and that it so remained there until the allowance of the respective claims filed against Trust No. 1 in the name of Hermann Sielcken in April of 1921 in purported pursuance of the Trading with the Enemy Act as amended.

FRANK C. STERCK.

Sworn to before me this 15th
day of September, 1938.
Isidore M. Fuchs,
Notary Public, Bronx County.
Bronx Co. Clk's No. 153, Reg. No. 152F40.
N. Y. Co. Clk's No. 812, Reg. No. OF448.
Commission expires March 30, 1940.
(Seal)

Index to Exhibits, (Annexed to Reply Affidavit of Frank C. Sterck). 2755

Exhibits

1 Pertinent part of Affidavit of Mr. Brainard Avery, executed on April 22, 1932.

2 Copy of dollar account "due Crossman & Sielcken from Theodor Wille," identified as "Reference Brazil Ledger J402-K 390."

3 Letter of Mr. Sielcken to G. W. Kirkpatrick, dated March 1, 1915.

4 Letter to George E. Warren from Edward Cornell, dated December 8, 1917. 2756

4-a Letter to Joseph A. Bower from George E. Warren, dated December 17, 1917.

4-b Letter to C. E. Hunter from J. A. Bower, dated December 18, 1917.

4-c Letter to Mr. Joseph A. Bower, from C. E. Hunter, dated December 19, 1917.

4-d Letter to George E. Warren from James M. Gifford, dated December 19, 1917.

4-e Letter to New York Office from C. E. Hunter, dated January 9, 1918. 2757

4-f Letter to H. M. Kilbourn from G. E. Warren, dated February 4, 1918.

4-g Letter to New York Office from C. E. Hunter, dated February 5, 1918.

4-h Letter to G. E. Warren from Manager, New York Office, General Business Dept., dated February 5, 1918.

4-i Letter to F. J. Horne from G. E. Warren, dated February 19, 1918.

4-j Letter to the Columbia Trust Co. from Ass't Director, Bureau of Trusts, APC, dated February 20, 1918.

2758 *Index to Exhibits, Annexed to Reply Affidavit of Frank C. Sterck*

Exhibit

4-k Letter to Atlantic Mutual Insurance Co. from Ass't Director, Bureau of Trusts, APC, dated Feb. 20, 1918.

4-l Letter to F. J. Horne from G. E. Warren, dated February 23, 1918.

4-m Letter to Alien Property Custodian from President of the Atlantic Mutual Insurance Company,
2759 dated February 23, 1918.

4-n Letter to F. J. Horne from G. E. Warren, dated May 7, 1918.

4-o Letter to F. J. Horne from G. E. Warren, dated May 23, 1918.

4-p Letter to Messrs. Crossman and Sielcken from Director, Bureau of Trusts, APC, dated June 6, 1918, and enclosure.

4-q Letter to Hon. A. Mitchell Palmer from G. E. Warren, dated Oct. 1, 1918.

4-r Letter Alien Property Custodian from G. E. Warren, dated Nov. 1, 1918.
2760

4-s Letter to Henry E. Ahern from G. E. Warren, dated May 13, 1919.

4-t Letter to George E. Warren from Director-Bureau of Trusts, APC, dated May 19, 1919.

4-u Letter to Henry E. Ahern from G. E. Warren, dated May 20, 1919.

4-v Letter to Morgan M. Mann from Bureau of Law, APC, dated Oct. 18, 1919.

4-w Letter to Walter U. Varney from G. E. Warren, dated October 22, 1919.

Index to Exhibits Annexed to Reply Affidavit of Frank C. Sterck 2761

Exhibit

5 Designation of Depositary, dated December 31, 1917.

5-a Designation of Depositary, dated July 30, 1918.

5-b Bond of Depositary, dated December 28, 1917.

5-c Designation of Depositary, dated April 2, 1918.

5-d Designation of Depositary, dated April 6, 1918.

5-e Designation of Depositary, dated October 19, 1918. 2762

6 "Individual Trust Ledger, Alien Property Custodian, Washington, Trust No. 1, Account of enemy, Hermann Sielcken, Address, Baden Baden, Germany."

6-a Typewritter copy of Exhibit 6.

6-b Credit Ticket No. 1.

6-c Credit Ticket No. 15.

2763

2764 **Exhibit 1, Annexed to Reply Affidavit of Frank C. Sterck.**

Pertinent Part of Affidavit of Mr. Brainard Avery.

SURROGATES' COURT,

COUNTY OF NEW YORK.

IN THE MATTER

of

2765 The Estate of Hermann Sieckien, Deceased.

State of New York,
County of New York, ss:

Brainard Avery, being duly sworn, deposes and says:

I am an attorney and member of the firm of Avery & Whiting, of No. 100 Broadway, New York City. Since 1927 I have been, and now am, personal counsel for Mrs. Clara Sielcken-Schwarz.

I first met Alex W. Sielcken, son of Mrs. Clara Sielcken-Schwarz, during the year 1926. In the spring of
2766 1927, during the course of other professional engagements, Mr. Sielcken spoke to me regarding certain claims that had been filed in 1922 on behalf of the Columbia Trust Company (now Irving Trust Company) as executor of the estate of Hermann Sielcken, deceased, with the Mixed Claims Commission (United States and Germany), at Washington, D. C., and had been subsequently withdrawn. Mr. Sielcken, on behalf of his mother, residuary legatee under the will of Hermann Sielcken, deceased, requested me to investigate these claims, with a view to reinstating and prosecuting them, if the facts warranted. The claims related to the seizure and condemnation in the British Prize Court of six certain cargoes shipped from New York by the firm of Crossman & Sielcken, destined to neutral consignees in Baltic ports, in the year 1915, and to certain indebtedness of the firm of Theodor Wille, of Hamburg, Germany to Crossman & Sielcken.

I immediately began an exhaustive investigation with respect to said claims and spent two months in Ger-

many during the summer of 1927. As the facts gradually became disclosed, I became convinced that meritorious claims existed against the German Government and the firm of Theodor Wille. Upon my return from abroad in October, 1927, I succeeded in having these claims reinstated before the Mixed Claims Commission and in December, 1927, caused an action to be instituted in the U. S. District Court for the Southern District of New York on behalf of Crossman & Sielcken (in Liq.) against the Alien Property Custodian and Zentral-Einkaufs-gesellschaft, m. b. H. (a war time purchasing agency of the German Government, hereinafter called Z. E. G.) which said agency I had discovered was the actual purchaser of the aforesaid cargoes, sometimes referred to as the Copenhagen cargoes, the effect of which action was to attach funds belonging to said Z. E. G. in the custody of the Alien Property Custodian. 2768

It seems unnecessary for present purposes to narrate in detail the extended legal services rendered in connection with the prosecution of these claims. The work covered a period of approximately three years, during which time I was continuously engaged on these matters and with relation thereto made three trips to Germany. Counsel associated with me also made trips to Germany and devoted many months there to investigation. I had numerous conferences in these matters in New York with John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken. William Martin, an accountant, at my request, went over the books and records of Crossman & Sielcken in Liq., insofar as they related to the claims in question, Voluminous records were located in Hamburg and Baden-Baden, Germany, which were transmitted to New York. The facts were complicated, not easy to understand, and became unraveled by degrees. 2769

The prosecution of these claims ultimately resulted in:

(1) A decree entered on December 30, 1929, in the United States District Court for the Southern District

2770 *Exhibit 1 Annexed to Reply Affidavit of Frank C. Sterck*

of New York in favor of the liquidation of Crossman & Sielcken against the Alien Property Custodian and Z. E. G. for $727,618.93, including accrued interest, which was paid, principal and interest, in April, 1930. The private banking house of Theodor Wille, of Hamburg, Germany, had in fact a joint one-half beneficial interest with Crossman & Sielcken in the claim arising upon the said Copenhagen cargoes, and, too, at the time of said recovery and because thereof, Z. E. G. was in effect asserting a substantial claim against Crossman & Sielcken by way of the estate of Hermann Sielcken, in Germany,
2771 by reason of a settlement that had been made during the period of the World War, with reference to said cargoes, between Z. E. G. and the executors in Germany of the Sielcken estate, undertaking to act in said matter.

In order to work out a settlement of these conflicting interrelated claims existing between Z. E. G., the house of Wille and the estate of Hermann Sielcken, all finding their origin in the matter of the Copenhagen cargoes, a settlement was made between the said parties, whereby one-half of the aforesaid sum of $727,618.93 was paid to Z. E. G. in consideration of the release of its
2772 said claim and the sum of $50,000 was paid to the house of Theodor Wille in release of its said claim, so that out of said total sum recovered there was left to the estate of Hermann Sielcken the net sum of $313,340.70, subject to legal fees and expenses.

(2) An award granted by the Mixed Claims Commission on April 21, 1930, in favor of the Irving Trust Company, as executor, and of Crossman & Sielcken in Liq. against the German Government, based upon the so-called Wille claims, amounting to $558,827.85, with interest thereon at the rate of 5% per annum from April 1, 1918, to date of payment, principal and interest at the time of the award amounting approximately to the sum of $900,000. Various payments have been made by Germany through the U. S. Treasury Department on account of said award and there now remains a bal-

ance unpaid thereon in excess of $300,000. The payment of this balance depends upon the receipt of funds from Germany available for such purpose.

Shortly after the aforesaid recoveries were made Mr. Sorenson began definitely to assert that he, individually, as a surviving partner of the firm of Crossman & Sielcken, had a substantial interest in the said recoveries and finally, both directly and through his personal accountant and counsel, his claim finally took definite form on the basis of the contention that the aforesaid recoveries were to be deemed substantially *in toto* as profits of the firm of Crossman & Sielcken realized in the year 1930 and that he accordingly was entitled to 12½% of same. Mr. Nielsen did not, so far as I know or am informed, make any such claim in his own behalf during his lifetime, but as will be pointed out below, the executor of his estate, after Mr. Nielsen's death, asserted a like claim to that of the Sorenson claim in behalf of Mr. Nielsen's estate against Crossman & Sielcken in Liq. and the estate of Hermann Sielcken, deceased, which latter claim is now the subject of present litigation pending and undetermined in the Supreme Court, New York County, as shown below. In addition to the said claims so asserted by Sorenson and by the Nielsen estate, four managers, formerly employed in the export department of the firm of Crossman & Sielcken, have asserted each in his own behalf claims upon the said recovery made for the so-called Copenhagen cargoes, which several claims of the said export managers are also the subject of—

2774

2775

* * * * * *

When the Nielson estate and Sorenson, in the said accounting action now being tried before Henry F. Wolff, Esq., as Referee, recently attempted to set up as an effectual bar to their own wrongful acts the said decree, settling and allowing the account of said executor, in this Surrogates' Court, which was based upon information furnished exclusively by Nielsen and Sorenson for their own unjust enrichment, I counselled Clara Sielcken

2776 *Exhibit 1 Annexed to Reply Affidavit of Frank C. Sterck*

Schwarz that, in my judgment, her only recourse in the interests of justice and fair dealing was to make an application to this Surrogates' Court to reopen and set aside the accounting decree.

The only persons interested in this instance application and proceeding and their respective post office addresses are as follows:

John S. Sorenson, whose post office address is 757 Carroll Street, in the Borough of Brooklyn, New York City;

The Chase National Bank of the City of New York,
2777 as ancillary executor in New York of the last will and testament of Thorleif S. B. Nielsen, deceased, whose post office address is 18 Pine Street, in the Borough of Manhattan, New York City; and

Irving Trust Company, as executor of the last will and testament of Hermann Sielcken, deceased, whose post office address is 1 Wall Street, in the Borough of Manhattan, New York City.

BRAINARD AVERY.

Sworn to before me this
22d day of April, 1932.
Emilie B. Bender.
2778
(Notarial Stamp.)

Exhibit 2, Annexed to Reply Affidavit of Frank C. Sterck.

Copy of Dollar Account "Due Crossman & Sielcken From Theodor Wille" Identified as "Reference Brazil Ledger J402-K390."

DUE CROSSMAN & SIELCKEN FROM THEODOR WILLE
DOLLAR ACCOUNT

Reference Brazil Ledger J 402-K 390 — Schedule 5

		Dollars			
1917	Amount brought forward	623,632.00	1917	Amount brought forward	
Apr. 27,	To Draft	3,242.09	Oct. 8,	By Balance	
" 27,	"	1,000.00			
May 7,	"	500.00			
" 10,	"	1,000.00			
" 16,	"	100.00			
June 14,	Services re loss on Coffee ex. "Carrillo"	28.50			
" 30,	Interest at 5%	10,220.29			
Aug. 10,	Charges on damaged coffee ex. "Sixaolo"	9.20			
Sept. 12	Cablegram to H. Hoeffner	7.15			
" 30,	Interest at 5%	4,805.00			
" 30,	Half loss on Copenhagen Cargoes—Schedule 5C	177,104.48			
		821,648.71			
1917			1917		
Oct. 1,	To Balance	551,251.42	Oct. 9,	By Proceeds, 427 B/C "Savamacca"	
" 8,	Interest at 5%—8 days to October 8, 1927	1,630.08	1918		
			Feb. 18,	Woolson Spice Co.—Dividend	
			Aug. 23,	Proceeds of sale by Alien Property Custodian of 360 shares Woolson Spice Co. stock at $680.00 equals	244,800.00
				Less—Expenses	174.03
			Aug. 23,	Balance	
		552,881.50			
1918					
Aug. 23,	To Balance	2[illegible],781.37			
" 23,	Interest at 5% on appropriate credits to the date of the respective credit	11,168.63			
1918					
Aug. 23,	To Balance due Crossman & Sielcken from Theodor Wille	$296,950.00			

2782 *Exhibit 2 Annexed to Reply Affidavit of Frank C. Sterck*

Schedule 5C

DUE CROSSMAN & SIELCKEN FROM THEODOR WILLE
HALF LOSS ON COPENHAGEN CARGOES

REFERENCE IMPORT JOURNAL 4/259

			Debits	Credits
To amount of Theodor Wille's 1/2 share on Copenhagen Cargoes shipped in 1915 (seized by British Govt. as follows):				
Feb. 27,	per S/S	Hilding	95,578.29	
Mar. 23,		Arkansas	48,686.81	
" 30,		Hellig Olav	28,105.99	
Apr. 13,		Gunborg	43,997.16	
" 28,		Indianic	53,471.41	
" 28,		Oscar II	33,625.87	
			353,465.53	
2783 May 26,	Received for Cereals S/S Oscar II		8,050.44	
			$345,415.09	
Add—Copenhagen Expenses paid by Theodor Wille			20,206.39	
Legal Fees London & N. Y.			14,533.47	
Interest to 9/30/17 at 5%			40,695.61	
			$420,850.56	
Less—Profits on Cargoes			66,641.60	
			$354,208.96	
1/2 of $354,208.96 equals			$177,104.48	
Charged to Theodor Wille-Dollar Account (amount due Crossman & Sielcken)				$177,104.48
			$177,104.48	$177,104.48

2784

Exhibit 3, Annexed to Reply Affidavit of Frank C. Sterck. 2785

Letter of Mr. Sielcken to G. W. Kirkpatrick, Dated March 1, 1915.

(Envelope):

G. W. Kirkpatrick Esqr.
c/o Crossman & Sielcken
90-96 Wall street
New York 2786

(Letter):

Hotel Aicton Pertin W
Unter den Linden 1
(Illegible.)

March 1/1915

My dear Mr. Kirkpatrick 2787

I am much pleased with your letter of Jany 26 and fully understand your complaints about the freights and the treatment of Finch Edge I: The latter received their instructions from the owners in Copenhagen, & are no doubt afraid that our shipments are for Germany I have spoken here to Mr. Volkens the senior partner of Finch Edge I: and he will do everything possible. Your engagement of 1000 tons of freight until June (inclusive) is all right. I have placed it & will probably order you to engage more. But I will get the order in writing, as freights are so high, that a lot of money can be lost.

Regarding Italy and Paulsen you will know, how to be careful, it is extremely dangerous, at the same time, this is an opportunity to make money.

Grain charters I had a great fight with a company, which was willing to do the business, we are doing, & promised all sorts of advantages which they cannot realize. They promised more then they can keep. Now I think the grain charters are sure if we can execute

2788 *Exhibit 3, Annexed to Reply Affidavit of Frank C. Sterck*

them in New York. They wanted cargoes of wheat, corn & Rye, As the latter is very difficult, you will have to get wheat & Corn. Oats are very much wanted, that however is contraband of war. The amount wanted here is some 35000 tons. Regarding Finances 3/4 is paid in New York, upon completing the cargo & the other 1/4 is paid on arrival here. I hope you will be fortunate in buying in New York, as the market fluctuates so violently. This business is very important & brings us into the highest quarters in Germany, & you will do no doubt everything in your power.

2789 The inquiry about Walnut is for the largest factory of arms in Germany, & will be still necessary after the war is over. The amount required is very large, and they are willing to pay any price for prompt shipment.

It is a pity we cannot ship Rubber or Copper. As a good German I would run the risk on Rubber. I cannot ask the same of you. I would be willing to give any kind of an oath, the same as I am willing to die for Germany.

Keep a sharp eye on Guinle they are in a lot of trouble, and the whole family does not understand much about business. Arnold is the best in the lot. Out of

2790 such an account in these times we ought to make big commission from 5 to 10%.

I have no doubt we will win the war, when? Nobody can guess easily. I remain here until the charter business is successfully undertaken.

Very truly yours

HERMANN SIELCKEN

Exhibit 4, Annexed to Reply Affidavit of Frank C. Sterck. 2791

DAVIES, AUERBACH & CORNELL

34 Nassau Street,

New York, December 8, 1917

Dear Sir:

I write in response to your request for advice concerning the disposition to be made of approximately 800 tons of rubber, which your Company, acting for Mr. J. A. Bower, representing the Alien Property Custodian, has taken into its possession from the firm of Crossman & Sielcken, who held the rubber as security for certain advances. 2792

I have examined the copies of the correspondence of Crossman & Sielcken which you sent me, consisting of letters from Mr. Sielcken, the senior partner, who was in Germany, to the partners in New York; a letter, dated February 26, 1916, from Weber & Schaer, of Hamburg, for whose account this business was undertaken; a letter, dated February 28, 1916, from the Deutsche Bank, Berlin, in which the Bank guarantees to reimburse the firm for certain advances desired to be made for the account of Weber & Schaer in the matter; also certain subsequent correspondence with Weber & Schaer, with Mr. Hilken, and with Mr. Lodders, who acted as the representatives in this country and South America, of Weber & Schaer. 2793

Although certain of the later correspondence would appear to indicate that this business was handled by Mr. Hilken, as principal, I think it is clear from the correspondence that this was not the fact and that the principals in the transaction, so far as Crossman are concerned, are Weber & Schaer, of Hamburg.

The letter from the Deutsche Bank may impose some liability on that Bank to reimburse Crossman & Sielcken, though this would depend on the question of fact as to whether the advances made by Crossman & Sielcken conformed to the terms of the letter from the Deutsche Bank, which were limited to purchases from certain parties in South America and were also limited in time.

2794 *Exhibit 4 Annexed to Reply Affidavit of Frank C. Sterck*

I understand from a conversation with Mr. Sorenson, one of the partners of Crossman & Sielcken, that it is his belief that as a matter of fact the credits were not given in accordance with the letter of the Deutsche Bank. I suggest that it would be well to have the books of the firm carefully examined on this matter.

Whether this is correct or not, the parties now interested in the equity in the rubber are resident in Germany and the Alien Property Custodian, as Trustee for them, can now, as representing such equity, direct
2795 or assent to the sale of such rubber.

It remains to consider whose consent is necessary on behalf of the lienholder. The firm of Crossman & Sielcken was composed of Mr. Siecken, who resided in Germany, and whose citizenship is in doubt, and Mr. Sorenson and Mr. Nielsen, American citizens, residing here. Under the partnership articles, the entire capital and assets of the firm belong to Mr. Sielcken, the interest of the other partners being confined to a portion of the profits, to be determined by a balance sheet and inventory.

In view of the fact that I have been previously consulted by Messrs. Sorenson & Nielsen with regard to their interests in the firm assets, I understand that you will
2796 take other advice on the question as to whether they now have any interest in the assets of the firm. This letter is written upon the assumption that they do not have any such interest, and therefore that the Alien Property Custodian, as Trustee for Mr. Sielcken, has the power to assent to the sale of the rubber, though, in view of the fact that certain of the correspondence would lend color to a claim on the part of Mr. Hilken that he is a principal in the matter, it might be prudent before doing so, to put him upon record, if possible, as being merely an agent for Weber & Schaer. I think, however, that the correspondence would be sufficient to prove such agency, even though he should now claim to be the principal.

I therefore advise, that after having received independent advice that Messrs. Sorenson and Nielsen can have no claim of title in the rubber under the terms

Exhibit 4 Annexed to Reply Affidavit of Frank C. Sterck 2797

of the partnership agreement, you should obtain the instructions of the Alien Property Custodian, as Trustee, representing the interests of Mr. Sielcken, of Weber & Schaer, and of the Deutsche Bank, if any, with regard to the sale or other disposition of the rubber.

Very truly yours,

EDWARD CORNELL

George E. Warren, Esq.
Vice-President, Columbia Trust Company,
60 Broadway, 2798
New York, N. Y.

MHR/EP.

2799

2800 **Exhibit 4-a, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

Sixty Broadway

New York

December 17, 1917

Joseph A. Bower, Esq., Manager
Business Department,
Enemy Alien Custodian
120 Broadway, New York City.

Received 12/17/1917
Answered 12/18/1917
By J. A. B.

2801

My dear Mr. Bower:

We have received a copy of the "Frankfurter Zeitung," a daily newspaper published in Frankfurt, Germany, dated October 11, 1917, containing a formal notice of the death of HERMANN SIELCKEN, who died on October 8th, 1917.

The Columbia Trust Company is in possession of a will signed by Mr. Siecken in which it is named as executor, and which we are now advised by counsel should be filed for probate. In view of the fact that this apparently alters the situation as regards the assets
2802 of the firm of Crossman & Sielcken, it will become necessary for the executor to account for the estate as of the date of Mr. Sielcken's death, October 8th, 1917, and to open up a set of books as of that date.

Do you not think it would be possible for the Alien Enemy Custodian to permit the turning over of the assets of Crossman & Sielcken to us as executor when the will is admitted to probate. We can then proceed to account for the value of the estate as of October 8th, the date of Mr. Sielcken's death, bring proceedings for the determination of the New York State Inheritance Tax, the Federal Inheritance Tax, liquidating any claims due to American citizens, and be prepared to hold for account of or turn over to the Alien Enemy Custodian, such proportion of the estate as belongs to alien enemies.

Awaiting your further advices or instructions, I am

Yours respectfully,

G. E. WARREN
Vice-President

gew.dw

Exhibit 4-b, Annexed to Reply Affidavit of Frank C. Sterck. 2803

ALIEN PROPERTY CUSTODIAN

Washington

16th & P Streets N W.

December 18, 1917.

C. E. Hunter, Esq.,
c/o Alien Property Custodian,
Washington, D. C.

2804

Dear Mr. Hunter:

Enclosed is copy of a letter today received from the Columbia Trust Company, with reference to the offering of Hermann Sielcken's will for probate and copy of my reply.

Mr. Warren spoke to me about this the other day, and I asked him to write me and I would forward the letter to you for advices in the premises.

I would think when the will is admitted we could permit the Trust Company to be sole custodian as executor of the will, and allow the matter to be discharged from your Department and go into the Estates Department.

2805

As it will be some time before the will is admitted, we will proceed as we have in the past to liquidate.

Please give us a ruling on the matter.

Very respectfully,

J. A. BOWER
Manager, General Business Dept.

BJ
Enc.
Rec'd. 12-19-1917
Ansd.
File Trust #1
Crossman & Sielcken

2806 **Exhibit 4-c, Annexed to Reply Affidavit of Frank C. Sterck.**

In replying address only
The Alien Property Custodian
and refer to No.

ALIEN PROPERTY CUSTODIAN

Sixteenth and P Streets NW.

Washington, D. C.

General Business Department.

2807

December 19, 1917. GB 192.

Trust No. 1.

Mr. Joseph A. Bower, Manager,
General Business Department,
Alien Property Custodian,
New York City, N. Y.

Dear Sir:

Answering your letter of December 18th, relative to the Trust Company being appointed the sole custodian, I
2808 referred the entire matter to the Noon meeting, Mr. Palmer being absent. An extract from the minutes reads as follows:

"In re the application made by the Columbia Trust Company named as executor under the will of Herman Seilcken for permission to that Company to conduct, manage and liquidate the business solely—it was decided that the better policy seems to be that our business manager, Mr. Bower, should continue substantially as heretofore suggesting, however, to the Columbia Trust Company, that he would welcome its co-operation and assistance in the conduct and liquidation of such business."

Please be governed accordingly.

Yours very truly,

C. E. HUNTER
Assistant Manager.

Exhibit 4-d, Annexed to Reply Affidavit of Frank C. Sterck. 2809

Law Offices

GIFFORD HOBBS & BEARD

60 Broadway

New York, December 19, 1917

George E. Warren, Esq.
V. P. Columbia Trust Co.
60 Broadway, New York City.

Dear Mr. Warren: 2810

I have further considered the question which you have submitted with reference to the right of John J. Sorenson and Thorleif B. Neilson, as surviving partners of Crossman & Sielcken to withdrew the profits to which they are entitled, as shown by balance sheet and statement prepared as of the 30th day of September, 1917.

Certain facts have been submitted as follows:

A balance sheet or statement has been prepared as of the 30th day of September (October 1st), 1917, from which it appears that the firm has made a profit subject to division in the proportion stated in the Copartnership 2811 Agreement, pursuant to which the firm of Crossman & Sielcken was formed.

Paragraph Tenth of the agreement provides that on or about the first day of October a full inventory account and balance sheet should be made and signed by the partners, which should state the debts and liabilities of the partnership and the net value thereof, as well as the profits standing to the credit of each member of the firm.

A statement has been prepared as of the 30th day of September, say, October 1st, 1917, conforming, as I understand it, in all respects to the requirements of the Tenth paragraph except that it is not the act of the partners and has not been signed by all the partners.

This statement, therefore, under Paragraph Tenth, would not, in my judgment, bind Herman Sielcken, if living.

2812 *Exhibit 4d Annexed to Reply Affidavit of Frank C. Sterck*

The question, therefore, is: Does it constitute a proper basis of settlement and adjustment with the surviving partners, it being admitted that since said date the said Sielcken has died?

I understand that Mr. Sielcken died on the 8th day of October. If the Copartnership Agreement was not terminated prior to that time, it would be terminated on that date. If it was terminated under the Enemy Alien Act prior to that time, that would doubtless be the date of adjustment. In any event, therefore, the adjustment
2813 should be made as of date not later than October 8th, the day of the death of Mr. Sielcken.

I am advised that in case the inventory, account and balance sheet had been prepared as of the 8th day of October, it would have been substantially the same as that actually prepared under date of September 30th, and that, therefore, for all practical purposes, the 8th of October may be taken as the date of adjustment.

The date of adjustment, therefore, in my judgment, must be fixed either as the date when the partnership was dissolved by *force majeure*, namely, by act of the Government, or at date of death, and at no later date.

It is, therefore, my opinion that, acting in behalf of the
2814 Alien Property Custodian, and, so far as you have any authority to act, in behalf of the Estate, you may safely take the inventory, account and balance sheet as of the 30th of September, assuming that there will be no practical difference between that date and the day of death.

Paragraph Eleventh of the Copartnership Agreement provides as follows:

"ELEVENTH: Upon the death of the party of the first part, it shall be the duty of the surviving partners to transfer and pay over to the executor of the will of the deceased partner his capital as above defined and also all the property and business of the firm."

I assume that "his capital as above defined" ascertained and determined as of September 30th would be substantially the same, in any event as great, as of the

Exhibit 4f Annexed to Reply Affidavit of Frank C. Sterck 2815

8th of October, the date of his death.

It is my judgment that the method adopted is correct and that the date of death or dissolution by act of the Government as above stated, fixes the time and that the interests, both of the survivors and of the representative of the deceased, should be ascertained, therefore, at one of said dates and that there being no material difference in the status between the two dates, the statement of September 30th (or October 1st) may be regarded as an accurate statement as of the 8th of October, 1917.

If I am correct in this assumption, then it is my opinion that the surviving partners are entitled to be paid their shares of the profits as shown by the statement in question, all the capital assets and profits representing the share of said Sielcken, to be paid over in due course to the party legally representing said estate. 2816

Very truly yours,

JAMES M. GIFFORD

2817

2818 **Exhibit 4-e, Annexed to Reply Affidavit of Frank C. Sterck.**

In replying address only
The Alien Property Custodian
and refer to No.

ALIEN PROPERTY CUSTODIAN
Sixteenth and P Streets NW.
Washington, D. C.

General Business
Department.

2819

January 9, 1918. GB 402.

New York Office: Crossman & Sielcken.

At the meeting held in Mr. Palmer's office January 8th, attended by Messrs. Palmer, Horne, Foster, Dunn, Fleming, Mann, Watson, Bower, Kilbourn and Hunter, the suggestion of the Columbia Trust Company, to the effect that we agree to their acting as sole executor and turning over to us the amount to which the Sielcken interests will be entitled after completion of the liquidation, was approved.

2820

Very truly yours,

C. E. HUNTER,
Per J. M. B.
General Business Dept.

CEH/JMB.

Exhibit 4-f, Annexed to Reply Affidavit of Frank C. Sterck. 2821

COLUMBIA TRUST COMPANY

Sixty Broadway

New York

February 4, 1918

H. M. Kilbourn, Esq.
Manager New York Office,
Alien Property Custodian
111 Broadway, New York City. 2822

Dear Mr. Kilbourn:

Referring to your inquiry in regard to the stock of the Woolson Spice Company held in the SIELCKEN estate, I write to advise that this property is held by the Columbia Trust Company as Executor under the will of Hermann Sielcken, which will has been filed for probate in New York. We are advised that the status of the property held by the Executor has changed its character, so that it is no longer alien enemy property, title vesting in the executor, which is a New York corporation.

The executor will administer the estate and will account in due course of administration, accounting of course to the Alien Property Custodian for any property which would be payable to alien enemies. (This is in accordance with the terms of the license issued by the War Trade Board.) 2823

Under the Sielcken Will, we are directed to dispose of this property, and it is entirely possible that the stock of the Woolson Spice Company will be sold before we account, so that the stock will never become the property of an alien enemy. In view of this situation, I do not see that the executor would have any authority to transfer the stock to the name of the Alien Property Custodian. I might state that I have taken up this question *with* Mr. Morgan M. Mann, who is counsel for the Alien Property Custodian, and he concurs with these views.

As you are aware, before the stock was taken over

2824 *Exhibit 4f Annexed to Reply Affidavit of Frank C. Sterck*

by the Executor, shares were issued by Crossman & Sielcken in liquidation in the names of the several Directors appointed to represent the Alien Property Custodian, in order to qualify them as Directors.

Trusting this will give you the information you desire, I am

Yours very truly,

G. E. WARREN
Vice-President

2825 g. e. w./DW.

A. P. C. Bureau of Law received, Feb. 11, 1918.
Referred to
Answered
Date
No.

Mann 350

2826

Exhibit 4-g, Annexed to Reply Affidavit of Frank C. Sterck. 2827

In replying address only
The Alien Property Custodian
and refer to No.

ALIEN PROPERTY CUSTODIAN

Sixteenth and P Streets NW.

Washington, D. C.

General Business
Department

2828

February 5, 1918. GB-755

Re: Crossman & Sielcken
Trust No. 1 & 7701

To New York Office.

I wish you would advise, for the general information of all concerned, as to the progress of the liquidation which has been made up to February 1st. It would seem that a considerable amount of money has been realized and that the estate of Herman Sielcken, whom the Alien Property Custodian is representing, might receive some remittance out of its liquidation. 2829

It may be necessary to await the final completion of the liquidation, but we would like for you to state the facts and the prospects of our receiving check on account at an early date. Please give me a complete statement as to when we may expect at least a partial remittance.

Yours very truly,

C. E. HUNTER
Assistant Manager
General Business Department

CEH-IMB

2830 **Exhibit 4-h, Annexed to Reply Affidavit of Frank C. Sterck.**

General Business Dept.
111 Broadway,
New York

Received, Feb. 6, 1918.
Answered

February 5th, 1918.

Crossman & Sielcken

Mr. G. E. Warren,
Columbia Trust Co.
60 Broadway,
New York City.

2831

Dear Sir:

We have received the following communication from Washington.

"This being the 4th of the month, it would be well to inform the various companies under liquidation under our supervision, or those continuing in operation, that we expect the usual monthly reports by the 10th ints."

Will you kindly see that a report of the Company which you are supervising is handed to us as quickly as possible.

2832 If we mistake not, we mailed to you a short time ago, instructions as to how this report was to be made out.

If these instructions are carefully followed, it will facilitate matters in Washington considerably.

Very truly yours,

Manager, New York Office
General Business Dept.

BOK:R

Exhibit 4-i, Annexed to Reply Affidavit of Frank C. Sterck. 2833

COLUMBIA TRUST COMPANY

Sixty Broadway

New York

February 19, 1918

F. J. Horne, Esq.
Department of Trusts,
Alien Property Custodian,
19th and P Streets,
Washington, D. C.

Alien Property Custodian
Received, Feb. 20, 1918.
Noted date
Answered H. T. H. date Feb. 20.
Report No. Trust No. 1. 2834

Dear Mr. Horne:

As you know, the Columbia Trust Company is liquidating the firm of CROSSMAN & SIELCKEN as Executor of the SIELCKEN estate, all of the assets of the firm belonging to the Sielcken Estate, the liquidation being carried on by us under a license issued by the War Trade Board January 21, 1918, No. ET-7463 and by a license issued to Sorenson and Nielsen, the surviving partners as liquidators, being license No. ET-7454.

The only complication we have run up against so far is in collecting a scrip certificate of the Atlantic Mutual Insurance Company, which they refuse to pay to us owing to the fact that you have notified them that the money should be paid only to your representative. Will you therefore kindly write the Atlantic Mutual and advise them that any moneys properly due to Crossman & Sielcken may be paid by check drawn to the order of Crossman & Sielcken delivered either to the liquidators, Sorenson & Nielsen, or the Columbia Trust Company. I believe there are other scrip certificates maturing in the future and it might be well to have this apply to the ones that are not yet due, as well as the one in question. 2835

I am sorry to have to trouble you, but this seems to be the only way that the Atlantic Mutual will pay over the funds.

With kind personal regards, I am

Yours very truly,

G. E. WARREN
Vice-President

2836 **Exhibit 4-j, Annexed to Reply Affidavit of Frank C. Sterck.**

Re: Trust F-1-H

Div. of Corporations

February 20, 1918.

Crossman & Sielcken

The Columbia Trust Co.,
60 Broadway,
2837 New York City.

Gentlemen:

Your favor of the 19th instant, regarding a Scrip certificate of the Atlantic Mutual Insurance Company, has been duly received.

The Atlantic Mutual Insurance Company advised us by letter dated February 8th, that application had been made to them for the collection of the certificate by "people" who stated it was their intention to pay the money over to us when collected. We merely advised them that the firm of Crossman & Sielcken was in process
2838 of liquidation under the supervision of this office and that payments should be made only to our representatives. They, evidently, misunderstood our letter, and we have written them today, a copy of which we herewith enclose. We have no doubt but that this letter will straighten out the matter.

Very truly yours,

Ass't Director, Bureau of Trusts.

Enc. (1)

HTH:MR

Exhibit 4-k, Annexed to Reply Affidavit of Frank C. Sterek. 2839

In replying address only
The Alien Property Custodian
and refer to No.

Tr. No. F-1-H

ALIEN PROPERTY CUSTODIAN

Sixteenth and P Streets NW,

Washington, D. C.

Div. of Corporations 2840

February 20, 1918

Crossman & Sielcken

Atlantic Mutual Insurance Co.,
51 Wall Street,
New York City.

Gentlemen:

You have evidently misunderstood our letter of the 12th instant. We advised you in that letter that payment of certificates of Scrip, standing in the name of Crossman & Sielcken, should be made only to our representatives in the liquidation of the firm of Crossman & Sielcken. This firm is being liquidated under licenses of the War Trade Board issued to Sorenson and Nielsen, and the Columbia Trust Co. under our supervision, so that it is proper for payment to be made to the liquidators. 2841

We trust this letter will straighten out the misunderstanding that appears to have arisen between you and the Columbia Trust Co.

Very truly yours,

Ass't Director, Bureau of Trusts.

HTH:MR

2842 **Exhibit 4-I, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

Trust File #1

Alien Property Custodian
Received Feb. 25, 1918
2843 Noted Date
Answered Date
Report No. Trust No.

February 23, 1918.

F. J. Horne, Esq., Asst. Director,
Bureau of Trust, Alien Property Custodian,
16th and P Sts., Washington, D. C.

Dear Mr. Horne:

Trust No. F-1-H

2844 Thank you very much for your favor of the 20th instant enclosing copy of the letter you have written to the Atlantic Mutual Insurance Company in regard to the payment of certain scrip registered in the name of Crossman & Sielcken. Your prompt attention is appreciated.

Very truly yours,

G. E. WARREN,
Vice-President.

gew.dw

Exhibit 4-m, Annexed to Reply Affidavit of Frank C. Sterck. 2845

Please Address
Post Office Box 6
Wall St. Station
New York

ATLANTIC MUTUAL INSURANCE COMPANY,
Atlantic Building,
49 & 51 Wall Street,
New York. 2846

Cable Address,
"ATLANTIC,"
New York.

1180694-G New York, February 23, 1918.

Alien Property Custodian
Received Feb. 25, 1918
Noted Date
Answered Date

Trust File

Alien Property Custodian,
Washington, D. C. 2847

Dear Sir:

Your No. Tr. No. F-1-H

Your letter of 20th instant has been received advising with respect to scrip standing in the name of Crossman & Sielcken on our books that we are under a misapprehension as to the requirements of your office. We note that Messrs. Sorenson and Nielsen and the Columbia Trust Company are the Liquidators of Crossman & Sielcken and that it will be in order for us to make payment of the scrip to the liquidators. We thank you for this information and we shall be governed accordingly.

Respectfully yours,

CORNELIUS ELDERT,
President

2848 **Exhibit 4-n, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

Trust #1

Hold

May 7, 1918

F. J. Horne, Esq., Director,
Bureau of Trusts,
2849 Alien Property Custodian,
Washington, D. C.

Alien Property Custodian
Received May 8, 1918
Noted Date
Answered W. L. W. Dated 5/8

Dear Mr. Horne:

Sometime in October, 1917, Crossman & Sielcken in Liquidation, paid to the Alien Property Custodian the sum of $100,000, being an advance payment. At that time it was not know that HERMANN SIELCKEN had died. Now that Columbia Trust Company has qualified as his Executor, this payment will have to be included as an asset of his estate, either as a claim against the Alien Property Custodian or as an advance distribution.

2850 The easiest way to handle it would appear to be to consider it an advance distribution, and in order that it may be so included in our accounts, I am writing to ask if you could have the enclosed receipt signed, acknowledging the payment of this sum.

With kind personal regards,

Yours very truly,

G. E. WARREN,
Vice-President

gew.dw

Exhibit 4-o, Annexed to Reply Affidavit of Frank C. Stepek. 2851

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

Alien Property Custodian
Received May 24, 1918
Noted Date
Ans'd Date
Report No. Trust No.

2852

May 23, 1918

F. J. Horne, Esq., Chief,
Bureau of Trusts,
Alien Property Custodian,
Washington, D. C.

R 4940
17412

Dear Mr. Horne:

TRUST NO. 1

We are in receipt of your favor of *the 18th instant* in reference to the payment of $100,000 made by Crossman & Sielcken in Liquidation to the Alien Property Custodian, and more especially in reference to our request for a receipt. 2853

You evidently misunderstand what we desire. This money was paid over to the Alien Property Custodian last October by Crossman & Sielcken in Liquidation, and a receipt was given to Crossman & Sielcken. Now that the Columbia Trust Company is qualified as Executor, this $100,000 becomes an asset of the Sielcken Estate and we must either claim the asset and endeavor to collect it (which we would do were it not for the fact that the money, being in the hands of the Alien Property Custodian, is in the hands of the party to whom we will account), or else we will have to show it in our accounts as an advance distribution, and it seems

2854 *Exhibit 4-o Annexed to Reply Affidavit of Frank C. Sterck*

foolish to bring an action to collect this amount and then turn it back to you.

In order to avoid all this and to straighten our accounts as we must show the disbursement of this money as Executor, we have forwarded to you a receipt acknowledging the receipt of this money from the estate, which would appear to be perfectly proper. I had taken this matter up with Judge Mann before passing the receipt on to you. I trust you will see your way clear to straightening this out for us.

2855 Very truly yours,

G. E. WARREN,
Vice-President.

gew.dw

Exhibit 4-p, Annexed to Reply Affidavit of Frank C. Sterck.

Trust No. F-1.
Division of Corporation

2856 June 6, 1918.

Messrs. Crossman and Sielcken,
90 Wall Street,
New York City.

R-10471

Gentlemen:

Enclosed herewith is a formal Acquittance for $100,000.00 paid by you to this office on October 26, 1917.

Very truly yours,

F. J. HORNE,
Director, Bureau of Trusts.

PS-H
Enclosure.

Exhibit 4-p Annexed to Reply Affidavit of Frank C. Sterck 2857

RECEIPT OF ALIEN PROPERTY CUSTODIAN

Not Negotiable

Each and every schedule that may be attached to this receipt must be signed by the Alien Property Custodian, with his seal of office affixed, in order to be of any validity.

This receipt is issued in pursuance of the following provisions of section 7 (*e*), "Trading with the enemy Act": 2858

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee." 2859

This instrument witnesseth: That I, A. Mitchell Palmer, duly appointed and qualified as Alien Property Custodian, under the authority and in pursuance of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, do hereby receipt for and acknowledge the payment, conveyance, transfer, assign-

2860 *Exhibit 4-p Annexed to Reply Affidavit of Frank C. Sterck*

ment, and delivery by Crossman and Sielcken, Address: No. 161-67 (Street.) Maiden Lane (City.) New York City (County.) (State.) New York, of the following money or property:

The sum of one hundred thousand dollars ($100,000.00), which money or property has been so paid, conveyed, transferred, assigned, and delivered to said Alien Property Custodian, as the money or property of an enemy or ally of enemy, or one whom there may be reasonable cause to believe to be an enemy or ally of enemy, to wit:

2861 Herman Sielcken, Address: Baden, Baden Germany.

To be by said Alien Property Custodian held, administered, and accounted for as provided by law.

Witness my hand and seal of office this sixth day of June, 1918.

Division of Accts. Credit Ticket No. 1.

Check deposited in U. S. Treasury Oct. 26, 1917.

A. MITCHELL PALMER
Alien Property Custodian.

2862 By HD
Managing Director.

Exhibit 4-q, Annexed to Reply Affidavit of Frank C. Sterck. 2863

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

October 1, 1918

R 17412

TRUST I

Hon. A. Mitchell Palmer, 2864
Alien Property Custodian,
Washington, D. C.

Alien Property Custodian
Received Oct. 2, 1918
Noted J. S. B. Date 10/4/18
Ans'd Date

Dear Mr. Palmer:

For your personal information, you may be interested to know that in connection with the liquidation of the estate of Hermann Sielcken, the Columbia Trust Company as Executor, has invested $2,000,000 in U. S. Government certificates of indebtedness. 2865

We expect to proceed as rapidly as possible to file our accounting and to ask for a decree enabling us to make a partial distribution, which I assume will involve the payment of something over $2,000,000 to the Alien Property Custodian.

Very truly yours,

G. E. WARREN,
Vice-President.

gew.dw

C. & P. Trusts
Oct. 3, 1918
Desk No. 2 J. S. B.

2866 **Exhibit 4-r, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

Paste this on the face
of your letter
C. & P. Trusts
Haydon

2867

Alien Property Custodian
Received Nov. 2, 1918
Noted Date
Ans'd J. S. B. Date 11/20/18

November 1, 1918

Alien Property Custodian
Division of Court and Private Trusts,
Washington, D. C.

C. & P. Trust
Nov. 2, 1918
Desk No.

2868 *Attention of Mr. W. C. Balderston*

Dear Sir:

I am in receipt of your favor of the 30th ultimo in reference to Report 17412, Trust No. C-1.

We are now preparing our account as Executor of the Estate of HERMANN SIELCKEN. As this is a very complicated account, it will take several weeks before it will be in shape for filing in the Surrogate's Court.

We have now under way transfer tax proceedings in the State of New York, to determine the amount of the inheritance tax. As the Alien Property Custodian is the chief beneficiary under the Will, he will receive due notice of all proceedings in the accounting. As a matter of fact, our purpose in bringing the accounting now is to obtain the Alien Property Custodian's approval of all transactions to date.

Very truly yours,

G. E. WARREN,
Vice-President.

Exhibit 4-s, Annexed to Reply Affidavit of Frank C. Sterck. 2869

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

May 13, 1919

Alien Property Custodian
Received May 15, 1919
Noted Date
Ans'd H. E. A. Date 5/19/19 2870

Henry E. Ahern, Esq., Managing Director,
Bureau of Trusts,
Alien Property Custodian,
Washington, D. C.

Dear Mr. Ahern:

I am asking if you will give your personal attention to the enclosed correspondence and give us the benefit of your opinion. The letters enclosed give the history of the case, which is an indebtedness of the estate of George C. Boldt to the Sielcken firm. 2871

Of course the estate of George C. Boldt is perfectly solvent and able to pay its claim in full. As far as the firm of Crossman & Sielcken is concerned, there are no offsets. Judge Mann has written Mr. Garvan in this connection informally approving of a settlement. It does not appear to us, however, as executor, that we have sufficient warrant to effect a settlement of this claim, knowing that the books show no offsets and that the Boldt Estate is fully able to make complete payment. Our inclination would be to have a judicial settlement, making the Boldt Estate prove any counterclaims they may have in the regular way, rather than to offhand effect a compromise. Of course in view of the size of the Sielcken estate every dollar that is compromised results in the loss to the United States Government of about

2872 *Exhibit 4s Annexed to Reply Affidavit of Frank C. Sterck*

twenty cents in the federal estate tax, as this estate comes in the twenty cent class.

In this connection, I would also like to have your ideas on the question of certain accounts due the estate of Herman Sielcken from enemy aliens located in Germany, amounting to several hundred dollars. Do you not think it would be possible to assert these claims against funds held by the Alien Property Custodian as a general claim of an American citizen (that is, considering the Sielcken Estate in the hands of an American citizen) and endeavor
2873 to collect these claims in the same way that similar accounts will be taken care of? It is true that any amount collected will be eventually turned over to the Alien Property Custodian when the estate is settled, but in enforcing such claims, the federal government will benefit by about 20% of the amount recovered in the way of a federal estate tax, and the State of New York will also receive its share of any amounts so collected.

With kind personal regards,

Yours very truly,

G. E. WARREN,
Vice-President.

2874 gew.dw

Exhibit 4-t, Anneexd to Reply Affidavit of Frank C. Sterck. 2875

TC-1-
R 17412

May 19, 1919

George E. Warren, Esq., Vice President
Columbia Trust Company
60 Broadway
New York City

Dear Mr. Warren:

2876

I have carefully gone over your favor of the 13th inst. and your enclosures relative to indebtedness from the Estate of George C. Boldt to the Sielcken firm.

On the statements in Mr. Sorenson's letter I should not think that the executor would be justified in making the settlement proposed. The Alien Property Custodian is of course interested in having the estate closed and the proceeds thereof remitted, but does not interfere with the administration, so that the expression above is my opinion and is not in any sense a direction from this office, the attitude of this office being that it should not give instructions to administrators who are acting under State laws.

2877

The last paragraph of your letter refers to amounts due the Estate of Herman Sielcken from enemy aliens located in Germany. I have consulted our Bureau of Law about this and am informed that it is in order for the executor to file Notices of Claims against property taken over by the Alien Property Custodian, providing that the Alien Property Custodian holds funds which were taken as the property of the debtors. That is, such Notices of Claim cannot be considered unless some properties of the enemies named therein are actually in possession of the Alien Property Custodian. You are of course familiar with the terms of Section 9 of the Act.

Couldn't you send us a few million dollars as a distribution on account of this estate?

With kindest regards, I am,

Yours very truly,

Director—Bureau of Trusts.

HEA/AS

2878 **Exhibit 4-u, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

May 20, 1919

Henry E. Ahern, Esq., Director,
Bureau of Trusts,
Alien Property Custodian,
2879 Washington, D. C.

Alien Property Custodian
Received May 22, 1919
Noted J. S. B. Date 5/22/19
Ans'd Date

Dear Mr. Ahern:

I am in receipt of your favor of the 19th instant, in reply to my letter of the 13th, and am glad to note that you agree with our ideas in regard to the settlement of the claim against the estate of the late George C. Boldt.

With regard to your second paragraph, the claims of the SIELCKEN ESTATE against enemy aliens unfortunately cannot be asserted against any funds in possession of the Alien Property Custodian, as I understand no accounts were taken over from these several parties. We
2880 will endeavor to file a proper claim with the Department of State for settlement under the Peace Treaty.

We are hoping to be prepared to make a distribution in a short time, and our accounts are nearly ready for filing with the Surrogate. I assume the Surrogate will enter a decree authorizing a partial distribution. The executor will of course have to withhold a considerable sum until certain pending litigation is cleared up, and the federal and state taxes are determined. These are held up on account of the doubt as to the value of the accounts due from enemy aliens, and I assume cannot be determined until after communication is free with Germany.

With kind regards,

Yours faithfully,

G. E. WARREN,
G. E. Warren,
Vice-President.

gew.dw

Exhibit 4-v, Annexed to Reply Affidavit of Frank C. Sterck. 2881

Oct. 18, 1919

Trust No. BL-C-1
Report No. 2139-40
File #00364-K.

Morgan M. Mann, Esq.,
24 Broad Street,
New York City.

Estate of HERMANN SIELCKEN. 2882

Dear Sir:

Some time ago you advised the writer personally that a distribution of perhaps $2,000,000 would be made in this estate some time in October. Will you kindly advise this office whether any disposition has been made and if not when a distribution is to be expected?

Very truly yours,

BUREAU OF LAW.
By

FBG/HMS.

2883

2884 **Exhibit 4-w, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

C. & P. Trusts
Oct. 23, 1919
Desk No.

October 22, 1919

2885 Walter U. Varney, Esq., Asst. Chief,
Bureau of Trusts,
Alien Property Custodian,
Washington, D. C.

Alien Property Custodian
Received Oct. 23, 1919
Noted J. S. B. Date 2/3/20
Ans'd Date

Report No. 7814 Trust C-1

Dear Sir:

I am in receipt of your favor of the 18th instant in which you refer to Report No. 7814 Trust C-1.

The balance to the credit of the late HERMANN SIELCKEN, which was reported to you in 1917, has been taken over by the Columbia Trust Company as executor of his estate, together with all the assets of the firm of Crossman & Sielcken of which he was a member.

2886

The progress of the liquidation of this estate has been reported to your office by your accountants, Arthur Young & Company, each month. The executor has filed intermediate accounts and the Alien Property Custodian is cited as an interested partner and is represented by your attorney, Mr. Morgan M. Mann, 15 Broad Street, New York City.

Very truly yours,

G. E. WARREN,
G. E. Warren
Vice-President.

gew.dw

Exhibit 5, Annexed to Reply Affidavit of Frank C. Sterck. 2887

ALIEN PROPERTY CUSTODIAN

Designation of Depositary

By virtue of the authority vested in me by order of the President dated October 29, 1917, "Executive Order fixing salary of and vesting certain power and authority in the Alien Property Custodian appointed under "Trading with the enemy Act," and in pursuance of the provisions of "An Act to define, regulate and punish trading with the enemy," approved October 6, 1917, 2888

I, A. Mitchell Palmer, Alien Property Custodian, hereby designate Columbia Trust Company of the City of New York, State of New York, as depositary of property of enemies or allies of enemies, a bond as required by law having been executed and filed by said depositary, to have the following authority and powers, subject to the following conditions and limitations, viz:

I. Powers.

To collect and receipt for any dividends or interest or income that may become due in respect of such property; 2889

To collect and receipt for any maturing obligations held by it for my account as such custodian;

To demand, receive and receipt for any moneys due or to become due on account of such property;

To lease and to renew leases, from time to time, of any of the real estate included in said property, for no longer term, however, than one year (unless with the express consent of the Alien Property Custodian had and obtained), to such persons and upon such terms as to said depositary may seem best, and to cancel, forfeit, and annul, in case of default, in accordance with the terms thereof, any lease or leases now or hereafter made;

To contract for and incur only such expense in connection with said property as may be necessary to prevent waste and protect such property, to the end that the interests of the United States in such property and

2890 *Exhibit 5 Annexed to Reply Affidavit of Frank C. Sterck*

rights, or of such person as may ultimately become entitled thereto or to the proceeds thereof, may be preserved and safeguarded;

To pay taxes and assessments, ordinary as well as extraordinary, levied or assessed upon said property, and all repairs and other expenses necessary to prevent waste and to protect such property, as hereinbefore stated;

To effect insurance of such necessary and proper kinds and in such amounts and in such companies as said depositary shall deem best and proper;

2891 Subject to the supervision of the Alien Property Custodian and to the limitations herein expressed, to manage such property and do any necessary acts or things in respect thereof and exercise any rights which may be or become appurtenant thereto or to the ownership thereof.

The depositary may in emergency, and in the absence of funds of a trust in its possession, advance funds for the cost of any of the foregoing expenses of such trust, and may charge interest on the funds so advanced, its repayment, however, to be made from the funds of such trust later available, but from no other source.

2892 II. LIMITATIONS.

This designation and authority is, however, subject to the following conditions and limitations, viz:

That said depositary shall from time to time execute, file, and maintain with the Alien Property Custodian such additional bonds as in the judgment of the Alien Property Custodian will be sufficient to protect the property from time to time on deposit with such depositary, such bonds to be conditioned as the Alien Property Custodian may direct;

That said depositary shall not—

(a) Reinvest any of the moneys received by it, nor the proceeds of any obligations coming into its possession hereunder, nor the proceeds of the sale of any property made;

(b) Sell or dispose of any real estate, securities, choses in action, or other property coming into its possession hereunder, except pursuant to specific authority therefor given by the Alien Property Custodian;

(c) Institute any legal proceedings, by suit or otherwise, except pursuant to specific authority therefor given by the Alien Property Custodian;

(d) Incur for charge to, or charge to, any trust in its possession hereunder any expense or obligation for legal services rendered to for or by said depositary, except pursuant to specific authority therefor given by the Alien Property Custodian; 2894

That said depositary shall at all times hold subject in all respects to the order of the Alien Property Custodian all property at any time and from time to time coming into its possession hereunder;

That this designation as depositary is subject to revocation at any time by the Alien Property Custodian, said depositary shall forthwith pay and deliver to the Alien Property Custodian any and all such property, free of any lien of said depositary for compensation for its services.

2895

III. ACCOUNTING.

All moneys collected from payment of principal of maturing obligations, and proceeds from the sale of real estate or other property, shall be immediately remitted to the Alien Property Custodian, or paid and deposited forthwith by said depositary into the Treasury of the United States, as the Alien Property Custodian shall direct.

Said depositary shall transmit to the Alien Property Custodian on the first days of March, June, September, and December of each year, or as soon thereafter as may be, fully itemized statements of its receipts and disbursements separately in respect of each trust in its possession hereunder, for the three months preceding such statement; each statement shall also contain a full and com-

2896 *Exhibit 5 Annexed to Reply Affidavit of Frank C. Sterck*

plete inventory of the property of such trust in its possession at the end of each quarterly period.

Said depositary on the 1st day of December of each year, or as soon thereafter as may be, shall remit to the Alien Property Custodian the net income in its possession hereunder on the 30th day of November preceding.

IV. COMPENSATION OF DEPOSITARY.

Said depositary shall receive for its services hereunder in connection with each trust a reasonable compensa-
2897 tion.

In WITNESS WHEREOF, I have hereunto set my hand at Washington, District of Columbia, this 31st day of December, 1917.

A. MITCHELL PALMER,
Alien Property Custodian.

2898

Exhibit 5-a, Annexed to Reply Affidavit of Frank C. Sterck. 2899

DUPLICATE

This should be returned to

ALIEN PROPERTY CUSTODIAN

APC Form No. 16B

ALIEN PROPERTY CUSTODIAN

Washington, D. C.

2900

Alien Property Custodian
Received Aug. 14, 1918
Noted Date
Ansd Date

DESIGNATION OF DEPOSITARY

By virtue of the executive order of the President of the United States, dated February 26, 1918, prescribing rules and regulations respecting the exercise of the powers and authority and the performance of the duties of the Alien Property Custodian under the "Trading with the enemy Act," and prior executive orders pursuant thereto: 2901

I, A. MITCHELL PALMER, Alien Property Custodian, hereby designate Columbia Trust Company of the city of New York, State of New York as depositary, agent, bailee, and attorney in fact (hereinafter called Depositary) of money or other property of enemies or allies of enemies.

The said Depositary shall have the following powers and duties, subject to the following conditions and limitations:

I. POWERS AND DUTIES.

Service of demands and receipt and holding of property for the account of the Custodian.

1. To serve demands and to receive and give receipt for the conveyance, transfer, assignment, delivery and

payment, made pursuant to demands, of any money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy, as and when the Alien Property Custodian may direct, and to hold the same for the account of the Custodian.

Collection of income.

2. (a) To collect and receive any and all moneys (including checks and drafts payable on demand) that have
2903 or may become due as dividends, interest, or income on any stock, bonds, notes, time drafts, time bills of exchange, or other securities or property held by said Depositary for the account of the Alien Property Custodian.

(b) To collect and receive all subscription rights, dividends, and other distributions and payments of income declared or made on account of stock, shares, certificates representing beneficial interests, bonds or other securities regardless of whether or not the same be in the possession of the Depositary, and regardless of whether or not the same have been transferred to the Alien Property Custodian upon the books of the corporation, association, com-
2904 pany, or trustee issuing the same, all as and when the Alien Property Custodian may direct.

Collection of principal.

3. (a) To collect and receive any and all moneys that have or may become due as the proceeds of any and all maturing obligations held by said Depositary for the account of the Alien Property Custodian, including as principal for such purpose any income which was past due at the time of the service of the demand therefor.

(b) To collect and receive all subscription rights, dividends, and other distributions and payments of capital declared or made on account of stock, shares, certificates representing beneficial interests, bonds, or other securities regardless of whether or not the same be in the possession of the Depositary, and regardless of whether or not the

same have been transferred to the Alien Property Custodian upon the books of the corporation, association, company, or trustee issuing the same, all as and when the Alien Property Custodian may direct.

Transfer of corporate stock, etc.

4. To require the transfer of corporate stock, shares, or certificates representing beneficial interests to be made upon the books of any corporation, unincorporated association, company, or trustee issuing the same, into the name of the said Depositary for the account of the Alien 2906
Property Custodian, and in the case of corporate stocks or shares, into the name of any other person, all as and when the Alien Property Custodian may direct.

Receipt of corporate notices, etc.

5. To receive notices issued by any corporation, unincorporated association, company, or trustee, in respect to stock, shares, certificates representing beneficial interests, bonds, or other securities held by said Depositary for the account of the Alien Property Custodian, and to receive notices in respect to such other stock, shares, certificates representing beneficial interests, bonds, or 2907
other securities as the Alien Property Custodian may direct; and further, to notify the Alien Property Custodian promptly of the receipt of any such notices, whereby any action on the part of the Alien Property Custodian might be advisable or necessary.

Sale and delivery of rights appurtenant to ownership of corporate stock, bonds, etc.

6. To sell and deliver any stocks, bonds, notes, or evidence of ownership or indebtedness of any corporate stock, shares, certificates representing beneficial interests, bonds, or other securities, or to make changes, deposits, or withdrawals of the same, all as and when the authority of the Alien Property Custodian is first obtained, but such sale may be made only at public auction (unless the

2908 *Exhibit 5a Annexed to Reply Affidavit of Frank C. Sterck*

President, stating the reasons therefor, should otherwise determine), and to American citizens.

Sale of commodities, or other tangible property.

7. To sell and deliver any commodity or other tangible property; such sale or delivery to be conducted in all respects as the Alien Property Custodian shall direct; provided that such sale may be made only at public auction (unless the President, stating the reasons therefor, should otherwise determine) and to American citizens, except
2909 that certain classes of tangible personal property enumerated in the Executive Order of April 2, 1918, may be sold at private sale in cases where the market value of the lot belonging to any one trust shall not exceed $10,000; and provided further that no sale of any kind may be made without the authority of the Alien Property Custodian first obtained.

Collection and receipt of proceeds of sale.

8. To collect or receive for the account of the Alien Property Custodian any and all moneys as the proceeds from the sale of any property when such sale is made
2910 pursuant to the conditions and limitations hereinbefore expressed.

Leases.

9. To lease and to renew leases from time to time of real estate in such form as the Alien Property Custodian may direct for no longer term, however, than one year (unless with the express consent of the Alien Property Custodian first obtained), to such persons and upon such terms as to the said Depositary may seem proper.

Expenses, taxes, insurance, and general management.

10. To contract for and incur only such expense in connection with any property, real or personal, as may be necessary to prevent waste and protect said property to the end that the interests of the United States in said

property and rights, or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded.

11. To pay taxes and assessments, ordinary as well as extraordinary, that have been or may be levied or assessed upon any property, real or personal, held for the account of the Alien Property Custodian.

12. To effect insurance of such necessary and proper kinds upon any property, real or personal, held for the account of the Custodian, and in such amounts and in such companies as said Depositary shall deem best and 2912
proper.

13. To manage any and all property, real or personal, and do any necessary thing or things with respect thereto, and exercise any rights which may become appurtenant thereto or to the ownership thereof, subject to the supervision of the Alien Property Custodian and to the conditions and limitations herein or hereafter expressed.

Advancing funds for necessary expenses.

14. In the case of emergency and in the absence of funds of any trust in the possession of said Depositary, 2913
to advance funds for the cost of any of the foregoing expenses of such trust, and to charge interest on the funds so advanced: *Provided,* That all such expenses shall be paid out of and in any event recorded as a charge against the trust to which such money or other property belongs.

II. Accounting.

1. The said Depositary shall render to the Alien Property Custodian, in such form and as may be required, quarterly separate reports for each trust on the first day of March, June, September, and December, of each year, or as soon thereafter as may be, the reports to include all items received to date, to and including the close of business on the last day of each quarter.

2914 *Exhibit 5a Annexed to Reply Affidavit of Frank C. Sterck*

2. The said Depositary shall forthwith remit to the Alien Property Custodian on the first day of March, June, September, and December of each year, unless sooner demanded in special cases, together with the quarterly reports required as of those dates, all net income in its possession on the said dates.

3. The said Depositary shall also forthwith remit to the Alien Property Custodian on the first day of March, June, September, and December of each year, unless sooner demanded in special cases, all moneys collected from
2915 the payments of principal of maturing obligations, and principal proceeds from the sale of any commodity or other tangible property, when such sale has been made pursuant to the provisions hereinbefore stated.

4. The said Depositary shall, upon the making or upon the renewing of any lease as hereinbefore provided for, report the same, with all the essential details thereof, forthwith to the Alien Property Custodian.

III. Further Conditions and Limitations.

This designation and authority is subject to the further
2916 following conditions and limitations, namely:

1. Said Depositary shall from time to time execute, file, and maintain with the Alien Property Custodian such additional bond or bonds as the Alien Property Custodian may require.

2. Said Depositary shall not—

(a) Reinvest any of the moneys received by it nor the proceeds of any obligations coming into its possession nor the proceeds of the sale of any property made hereunder.

(b) Sell or dispose of any real estate.

(c) Institute any legal proceedings by suit or otherwise except pursuant to specific authority therefor given by the Alien Property Custodian.

Exhibit 5a Annexed to Reply Affidavit of Frank C. Sterck 2917

(d) Incur for or charge to any estate or trust in the possession of the said Depositary any expense or obligation for legal services rendered to, for, or by said Depositary except pursuant to specific authority therefor given by the Alien Property Custodian.

(e) Give proxies in relation to any stock, shares, or certificates representing beneficial interests, unless specifically authorized by the Alien Property Custodian.

3. Said Depositary shall at all times act in all respects subject to the supervision, direction, and orders, general or special, of the Alien Property Custodian, and subject 2918
to any rules and regulations which he may prescribe in relation to all money or other property which at any time may come into the possession of said Depositary, anything to the contrary herein contained notwithstanding.

4. Said Depositary shall receive for its services rendered in connection with each trust such reasonable compensation, and at such periods, as the Alien Property Custodian shall designate, the amount of such compensation to be retained by said Depositary, as earned, out of the funds of the trust in its possession, received by it.

5. This designation shall not go into effect until (1) 2919
a bond in the amount and form prescribed by the Alien Property Custodian has been given by the Depositary and approved by the Alien Property Custodian, and (2) until this designation is accepted in the form herein provided, pursuant to a resolution of the board of directors or duly authorized committee of the Depositary.

IN WITNESS WHEREOF, I have hereunto set my hand at Washington, District of Columbia, this 30th day of July, nineteen hundred and eighteen.

ALIEN PROPERTY CUSTODIAN,
By J. H. S.
Managing Director.

2920 *Exhibit 5a Annexed to Reply Affidavit of Frank C. Sterck*

Pursuant to a resolution passed the 8th day of August, 1918, by the Executive Committee of the undersigned, Columbia Trust Company the Depositary above designated, such designation is hereby accepted this 8th day of August, 1918, subject to all the conditions and limitations therein contained, a bond as required having been executed by the undersigned, and approved by and filed with the Alien Property Custodian.

COLUMBIA TRUST COMPANY,
(Name of depositary.)
2921 By L. W. WIGGIN,
Secretary.

[Seal.]

(Executed in duplicate.)

2922

Exhibit 5-b, Annexed to Reply Affidavit of Frank C. Sterck. 2923

A. P. C. Form No. 14.

(Copy)

ALIEN PROPERTY CUSTODIAN

BOND OF DEPOSITARY.

The Following Rules Must Be Observed In The Execution Of Bonds:

2924

1. A corporate surety company duly qualified under the act of Congress of August 13, 1894, as amended by the act of March 23, 1910, may be accepted as sole surety, in amounts not exceeding one-tenth of its capital and surplus on any one bond.

2. The full name and residence of principal and surety must be clearly written in the body of the bond.

3. The bond must bear date as of the day upon which it was actually executed.

4. Evidence of the qualification of a surety company under the regulations of the Treasury Department of the United States, and of the authority of its officers or agents executing the bond on its behalf must be filed with the Alien Property Custodian, *but must not be attached to the bond.* 2925

5. If the principal is an incorporated company, the person executing the bond in its behalf must be duly authorized by such company to make, execute, and deliver such bond and to affix or have affixed thereto the corporate seal of the company, and a certificate as to such authority by the secretary of said company, under its seal must be furnished.

6. If the bond is given by persons composing a firm or partnership, each member of the firm must execute it personally; but if any member of the firm be unable to personally execute the bond, it may be executed in his behalf by an attorney-in-fact, duly authorized by power

2926 *Exhibit 5b Annexed to Reply Affidavit of Frank C. Sterck*

of attorney under seal, which power, or a certified copy thereof, must accompany the bond. The names of all persons composing the firm must appear in the body of the bond, as, for example, "A, B, and C, composing the firm of A, B, & Co."

7. Each signature must be made in the presence of two persons who must sign their names as witnesses.

8. All erasures and interlineations must be noted above the signatures of the witnesses as being made before the execution of the bond.

2927

If it is desired to furnish bond with individual sureties, apply to Alien Property Custodian for instructions.

KNOW ALL MEN BY THESE PRESENTS that we, Columbia Trust Company of New York, N. Y., as principal, and American Surety Co. of New York, a corporation of the state of New York, as surety, are held and firmly bound unto A. MITCHELL PALMER, Alien Property Custodian, and to his successors in office in the sum of One Thousand dollars ($1,000), for the payment of which well and truly to be made, we bind ourselves jointly and severally, our joint and several successors and assigns, firmly by these presents.

2928 WITNESS the corporate seals of the parties hereto, duly attested. Dated, the 28th day of Dec., 1917.

THE CONDITION OF THIS OBLIGATION IS SUCH that, whereas Columbia Trust Company has been designated as a depositary under the provisions of section 12 of the act of Congress entitled "An act to define, regulate, and punish trading with the enemy, and for other purposes," and has accepted and agreed to act under such designation,

NOW, THEREFORE, if the said Columbia Trust Company shall truly and faithfully execute and discharge all of the duties imposed upon it as depositary aforesaid as provided by law, and shall faithfully account for and turn over to the Alien Property Custodian all moneys received by it for or on account of said Alien Property Custodian

Exhibit 5b Annexed to Reply Affidavit of Frank C. Sterck 2929

and, whenever required, shall account for, deliver, and turn over to the Alien Property Custodian, or to such person, firm, or corporation as the said Custodian shall direct, or as may be otherwise provided by law, any and all of the property which shall come into its possession by virtue of the designation aforesaid, then this obligation shall be void; otherwise it shall remain in full force and effect.

COLUMBIA TRUST COMPANY

By WILLARD KING
President. 2930

Signed, sealed, and delivered in presence of
O. R. Judd

ATTEST:

L. W. WIGGIN
Secretary.
[Seal.]

ATTEST:
Louis J. Papen
Res. Asst.

AMERICAN SURETY CO. OF NEW YORK 2931

By E. D. SADLER
Res. Vice President.

Depositary's Bond
of

As designated by Alien Property Custodian Dec. 31, 1917.

Examined and passed as to compliance with rules.

W. B. PRIEST,
Manager of Depositaries Section.

2932

Exhibit 5-c.

2933

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EXHIBIT 5-C to REPLYING AFFIDAVIT of
FRANK C. STERCK.

APO 24.

ALIEN PROPERTY CUSTODIAN

DESIGNATION OF DEPOSITARY

(To cover specific trust where Depositary already qualified)

To Columbia Trust Co.
New York, N. Y.

By virtue of the authority vested in me by order of the President, dated October 28, 1917, and pursuant to the provisions of the "Trading with the Enemy Act," I hereby designate you as depositary of the property of Hermann Sielcken
of Germany
an enemy, to be held and administered by you, with the authority and powers, and subject to the conditions and limitations, contained in the designation of you as depositary hitherto made by me, and dated December 31st, 191 7.

IN WITNESS WHEREOF, I have hereunto set my hand at Washington, District of Columbia, this 31st day of April, 191 8.

A. [illegible]
Alien Property Custodian.

By

[illegible]

EXHIBIT B-D to REPLYING AFFIDAVIT of
FRANK C. STERCK.

APC 84.

A. P. C. Trust No. F-1
Report No. 6017

ALIEN PROPERTY CUSTODIAN

DESIGNATION OF DEPOSITARY

(To cover specific trust where Depositary already qualified)

To Columbia Trust Co.
New York City

By virtue of the authority vested in me by order of the President, dated October 29, 1917, and pursuant to the provisions of the "Trading with the Enemy Act," I hereby designate you as depositary of the property of Herman Sieloken, (Deceased)
of Baden Baden, Germany
an enemy, to be held and administered by you, with the authority and powers, and subject to the conditions and limitations, contained in the designation of you as depositary hitherto made by me, and dated Dec. 21, 1917

IN WITNESS WHEREOF, I have hereunto set my hand at Washington, District of Columbia, this 6th day of April, 1918

A. MITCHELL PALMER
Alien Property Custodian.

By
Manager Depositary Section

2938 **Exhibit 5-e, Annexed to Reply Affidavit of Frank C. Sterck.**

APC 94. A. P. C. Trust No. C-1
Report No. 17412

ALIEN PROPERTY CUSTODIAN

Designation of Depositary

(To cover specific trust where Depositary already qualified)

2939

To Columbia Trust Company,
New York, N. Y.

By virtue of the authority vested in me by order of the President, dated October 29, 1917, and pursuant to the provisions of the "Trading with the enemy Act," I hereby designate you as depositary of the property of Gustav Diederichsen, Kiel, Germany. Heinrich Diederichsen, Kiel, Germany. Carl Isenberg, Germany. Richard Isenberg, Germany. Heinrich Seidel, Baden-Baden, Germany. Lina Kraft, Baden-Baden, Germany. City of Baden, Baden-Baden, Germany. Josephine Heim Hos-
2940 pital, Baden-Baden, Germany. Clara Sielcken, Germany, an enemy, to be held and administered by you, with the authority and powers, and subject to the conditions and limitations contained in the designation of you as depositary hitherto made by me, and dated December 31st, 1917.

Subject to change, you shall receive as compensation for your services rendered in connection with the above trust, ... per cent of gross income collected, to be deducted quarterly at the time of rendering quarterly reports, out of the funds belonging to the trust.

In witness whereof, I have hereunto set my hand at Washington, District of Columbia, this 19th day of October, 1918.

A. MITCHELL PALMER,
Alien Property Custodian.
By H. M. M.
Manager Depositary Section.

[redacted] TRUST LEDGER

INDIVIDUAL

ACCOUNT OF [illegible] Heinrich Vielchen

ADDRESS Baden Baden Germany

DEPOSITARY

TRUST No. 1

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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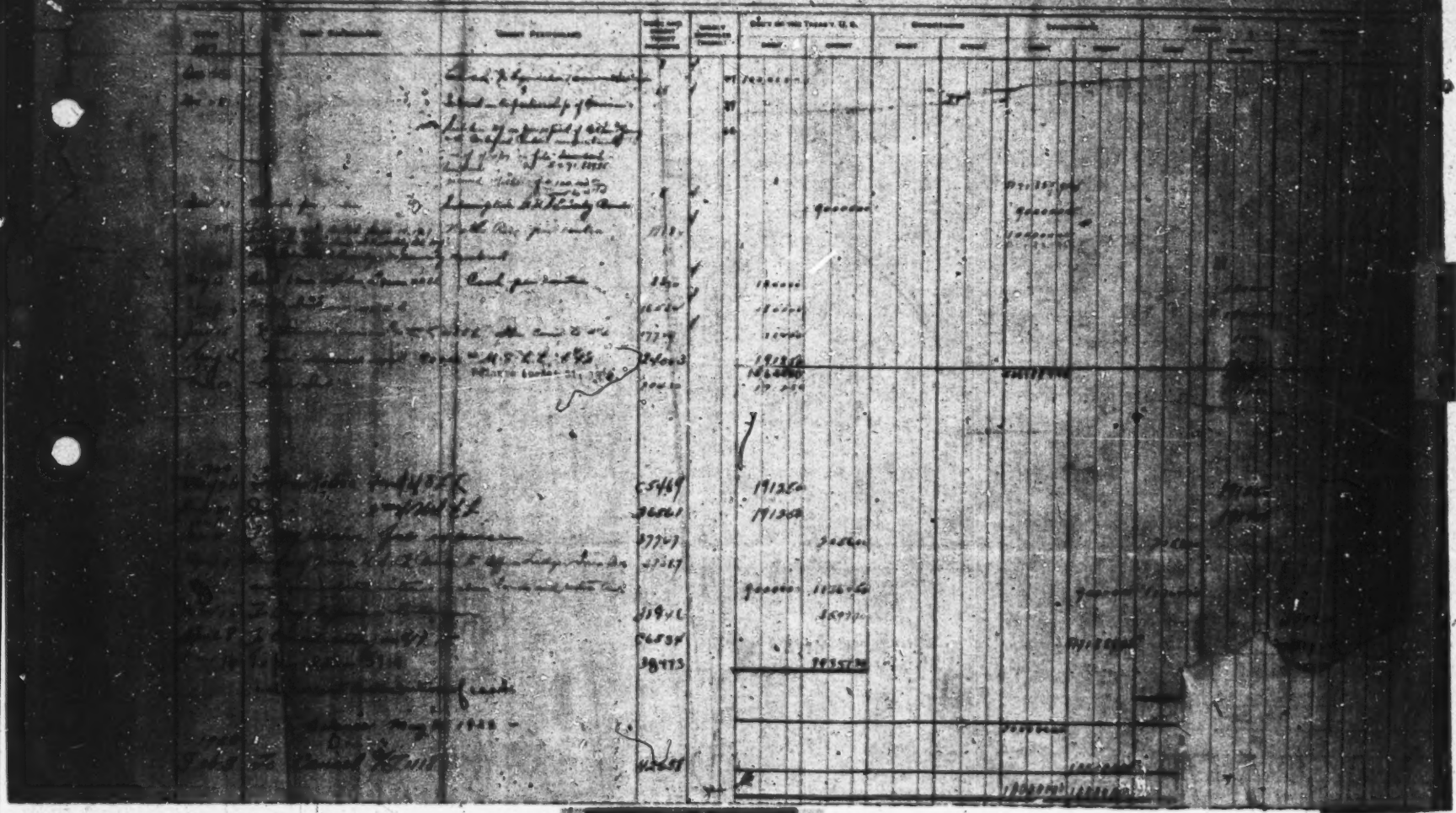

Tightly Bound

2944

Exhibit 6-a.

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EXHIBIT 6-A.

ALIEN PROPERTY CUSTODIAN, WASHINGTON

INDIVIDUAL TRUST LEDGER

[illegible]

TRUST NO. [illegible]

DEPOSITARY

[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
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EXHIBIT 6-B.

ALIEN PROPERTY CUSTODIAN, WASHINGTON

CREDIT TICKET No.

Name: Hermann Sielcken

Address:

PARTICULARS		
[illegible] of Crossman & Sielcken Fe liquidation		
See D/T - [illegible]		
TOTAL CREDITS		

For DEBITS to:

Cash with Depository	
Sec'y of U. S. Treas'y	100000
Investments: Stocks	
Bonds	
Mortgages	
Notes Receivable	
Accounts Receivable	
Real Estate	
Misc. Merchandise, etc.	
TOTAL DEBITS	

Name of Depositor: Crossman & Sielcken

Address: New York

Depository: Secy of Treas U.S.

Address:

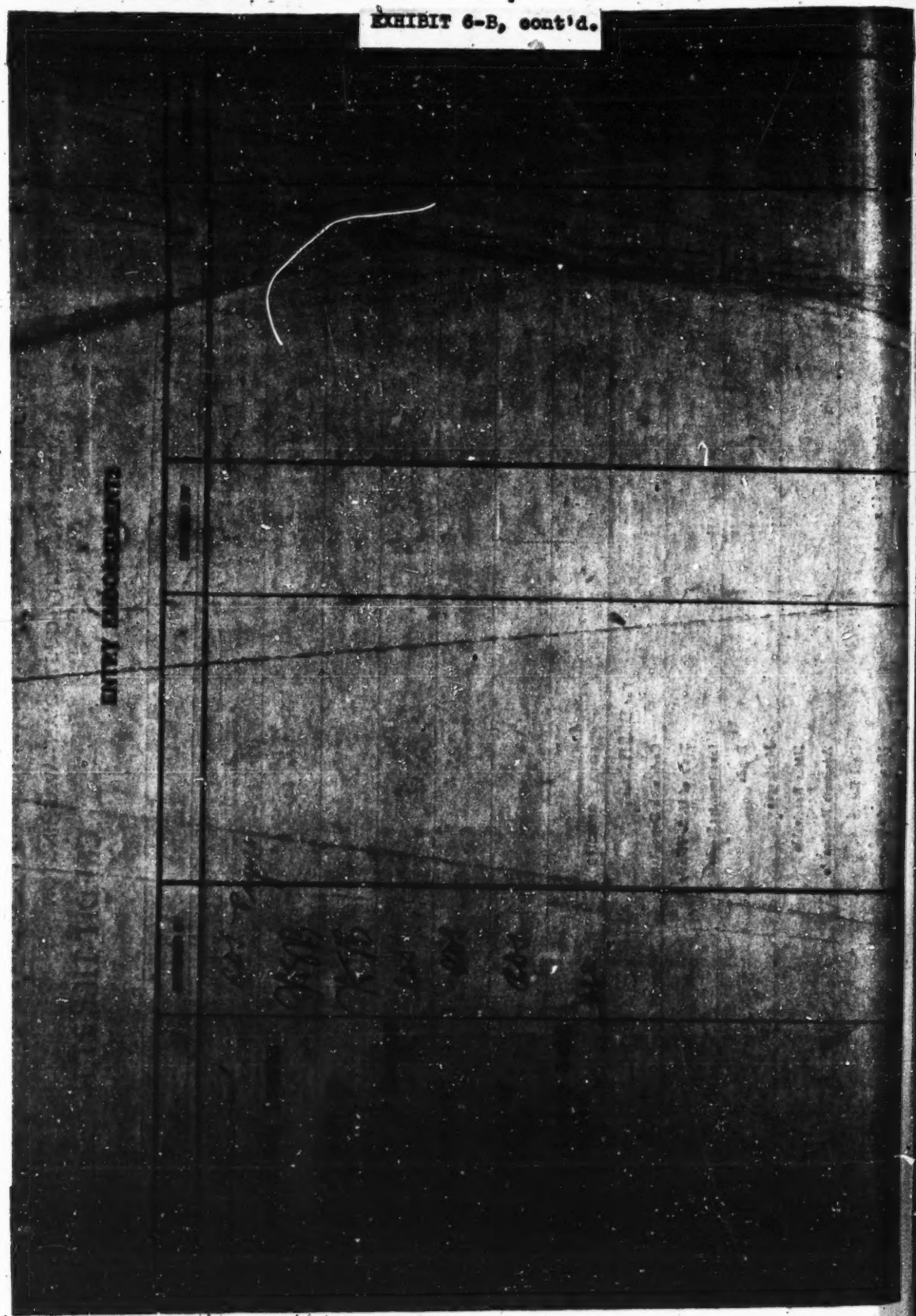
CHECK X IN SPACE TO DESIGNATE

X	ENEMY, ACCOUNT
	ALLY OF ENEMY, ACCOUNT

Entry Authorized by: RDS

Chief of Division of Accounts

EXHIBIT 6-B, cont'd.



ALIEN PROPERTY CUSTODIAN—WASHINGTON

CREDIT TICKET, No. 15

Credit Account of Herman Dielcken

Date NOV 28 1917

Address

Trust No. 1

PARTICULARS	INVESTMENT	INCOME	[illegible]
Interest in co-partnership of Cassman & Dielcken N.Y. as per [illegible] of [illegible] Young & Co. [illegible] [illegible] as of 9/30/17 on file 5271889.95 Less cash received 10/26/17 per [illegible] 100,000.00			5171889.95
TOTAL CREDITS			

Entry cancelled C/R 6534 4-8-21

By whom Deposited Cassman & Dielcken

Address N.Y.

Depositary Cassman & Dielcken

Address N.Y.

(MARK X IN SPACE TO DESIGNATE)

	ENEMY, ACCOUNT
	ALLY OF ENEMY, ACCOUNT

Entry Authorized by

CHIEF OF DIVISION OF ACCOUNTS

For DEBITS to:			
Cash with Depositary			
Sec'y of U. S. Treas'y			
Investments: Stocks			
Bonds			
Mortgages			
Notes Receivable			
Accounts Receivable			
Real Estate			
Misc. Merchandise, etc.	5171889.95		
TOTAL DEBITS			

EXHIBIT 6-C.

Reply Affidavit of Harold H. Martin.

2959

(Annexed to Affidavit of Frank C. Sterck of September 15th, 1938.)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

2960

against

HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUF GESELLSCHAFT m. b. H.,

Defendants.

Equity No. 44-28.

In Proceedings to Vacate Final Decree of December 30, 1929.

2961

Washington,
District of Columbia, ss:

Harold H. Martin, being duly sworn, deposes and says:

That he has been connected with the American Agency, Mixed Claims Commission, United States and Germany, since its organization in October, 1922; that for some years past he has been the Counsel and the Assistant to the American Agent before said Commission.

According to my best recollection, the first conference that I had in relation to the claims against Germany of Crossman & Sielcken was with Brainard Avery, Esquire, of New York, and R. S. Doyle, Esquire, of Washington, D. C., representing claimants, on March 31, 1927. There is attached hereto and made a part of this affidavit and marked "A," a true copy of a contemporaneous memo-

randum made by me on March 31, 1927, setting out the main facts in relation to the conference.

On November 21, 1928, I had another conference in particular relation to the claim pending before the Commission against the Z. E. G., docket No. 8305. A true copy of my memorandum of November 21, 1928, covering this conference is attached hereto, marked "B," and made a part of this affidavit.

On January 9, 1930, I had another conference with attorneys connected with these claims. A true copy of
2963 my contemporaneous memorandum dated January 9, 1930, covering this conference is to be found set out in full in the affidavit of Frank C. Sterck, dated May 18, 1938, and filed with the moving papers. Copy of this memorandum was sent Brainard Avery, Esquire, on January 14, 1930. There is attached hereto, marked "C," and made a part of this affidavit a true copy of Mr. Avery's letter of January 16, 1930, acknowledging receipt of the memorandum, together with a true copy of my letter of January 20, 1930, to Mr. Avery in relation to his letter of January 16, 1930, marked "D."

On March 15, 1930, Robert W. Bonynge, the American
2964 Agent, wrote me the following letter in relation to the Crossman & Sielcken claims:

"Dear Mr. Martin:

"My understanding of the Crossman & Sielcken matter is if claimant collects judgment against A. P. C., we will dismiss the claim based on the debt of Z. E. G. At the same time we are to have award against Germany for damages due to exceptional war measures in the so-called Willy claim. If Crossman & Sielcken are in any way indebted to Willy or Willy has a claim against them that C & S are willing to compromise that is a matter in which we are not interested and can not be considered in fixing the amount of the award against Germany for damages. Is not this the situation? If so, we must not insist that any award against Germany must not in any way be involved or concerned with the disposition that

C & S may make of the proceeds either of their judgment aganst the A. P. C. or any award they may obtain against Germany."

There is attached hereto and made a part of this affidavit a true copy of such excerpts from my letter of March 17, 1930, replying to Mr. Bonynge's letter of March 15, 1930, as relate to the Crossman & Sielcken matter, marked "E."

On March 17, 1930, I had a conference with the German Agent and representatives of various interested parties at which conference the settlement reached in the conference of January 9, 1930, was modified and a settlement was finally reached on the basis of fifty-fifty. A true copy of my memorandum of March 17, 1930, covering this conference is set out in full in said affidavit of Frank C. Sterck.

On March 18, 1930, the German Agent sent me a memorandum confirming the settlement agreed to in the conference on March 17, 1930, which memorandum reads as follows:

"March 18, 1930

"Mr. H. H. Martin
American Agency.

My dear Mr. Martin,

re Columbia Trust ./. Wille
Docket 8304
Columbia Trust ./. Z. E. G.
Docket 8305

"In reference to our conversation I beg to say that we are now in a position to consider settlement of the above claims by paying fifty (50) percent of the 'Kriegsanleihe'—Claim. Whether or not we shall approve of such settlement will depend upon certain matters, the outcome of which we are waiting to hear.

"I shall let you know at the earliest possible date when we are ready to come to a conclusion.

"Very truly yours,

KARL VON LEWINSKI R.
Agent of Germany"

2968 *Reply Affidavit of H. H. Martin*

The compromise settlement of the Wille claim, docket No. 8304, was reached on the basis of the truthfulness of the allegations contained in the Memorial filed before the Commission by the United States on behalf of claimants and supported by the exhibits accompanying such Memorial. No serious question was ever raised by the respondent government, Germany, to the truthfulness of any of the facts as set out in the Memorial. The compromise figure was arrived at by the Commission on the basis of the agreement signed by the American Agent
2969 and the German Agent, and thus relieved the Commission of determining the correctness of the figures or claims set out in the Memorial. It is my very distinct recollection that Thomas E. Rhodes, Esquire, then of the Department of Justice, attended none of the conferences in the Agency relating to the settlement of any of the Crossman & Sielcken claims, and I have no knowledge that Mr. Rhodes was acquainted with the details of the settlement other than such as is indicated in my memorandum aforesaid of January 9, 1930, in which I said that:

"Mr. Barnes then said that the Department of Justice through Mr. Rhodes was fully advised as to the possible
2970 settlement between the Z. E. G. and the liability of the Sielcken estate under the Indemnity Agreement."

HAROLD H. MARTIN
Harold H. Martin

Subscribed and sworn to before me this
14th day of September, 1938.
Percy F. Allen,
Notary Public.
(Seal)

Exhibit A, Annexed to Reply Affidavit of Harold H. Martin. 2971

(Copy)

MEMORANDUM

March 31, 1927.

Re: Claims against the Government of Germany of the Estate of Hermann Sielcken, deceased, sole owner of the firm of Crossman & Sielcken, New York, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the said firm, List Nos. 636, 6207 and 9406. 2972

Mr. Avery of the firm of Barnes, Avery and Whiting, New York, New York, and R. S. Doyle, Esquire Southern Building, Washington, D. C., called this morning in relation to the above mentioned claims.

I advised these gentlemen that these three claims, together with a fourth claim, No. 10093, involving war risk insurance premiums, signed by the same claimants, were in accordance with letter of February 5, 1924, from Messrs. Munn, Anderson and Munn, Transportation Building, Washington, D. C., formally withdrawn from further consideration before the Commission, and returned to the Department of State on February 8, 1924. 2973

Claims number 636 and 9406, filed in a total amount in excess of $300,000, as disclosed by the petitions, involved cargoes seized from various vessels by the British authorities before the entry of this country into the war. These seizures, as I understand, were made on the theory that the property involved, "fat-backs," were goods consigned to an enemy country. A claim of this character would not be, as I told these gentlemen, a claim against Germany, under the Treaty, although they might possibly have a claim against Great Britain, based on an unlawful seizure of the goods.

As I understand, however, from the investigations recently made by Mr. Avery and Mr. Doyle, it may be

2974 *Exhibit A Annexed to Reply Affidavit of Harold H. Martin*

that a claim may be developed against Germany, predicated on the failure of the purchaser of the goods involved to pay the firm of Crossman and Sielcken the purchase price of the goods. The purchaser in this instance, it develops, is the so-called Central Purchasing Agency, a German company that is said to have been owned entirely by the German Government.

As I understood from Mr. Avery, the following is a list of the vessels from which cargo was seized by the British authorities, which seized cargo was out through
2975 the British Prize Court:

Dan. Oscar II
Nor. Hildnig
Dan. Arkansas
Dan. Hellig Olav
Swed. Gunborg
Swed. Indianic
Dan. United States

The decisions of the British Prize Court, involving these cargoes, should be found in Lloyd's Prize Cases.

Claim number .6207 was filed as a debt in the amount
2976 of $206,720 said to be due claimant from Theodor Wille of Hamburg. There was filed with the Agency no evidence in support of this claim. However, as I understand the facts from my conversation with Mr. Avery and Mr. Doyle, this claim, in fact, arises out of a joint adventure in the purchase in 1913, of a large amount of Brazilian coffee. The financing of the purchase was apparently accomplished jointly by Sielcken and Wille on a fifty-fifty basis, the purchaser apparently being a German Coffee Firm in Hamburg, P-Z Company. As a result of the transaction the P-Z Company became indebted prior to the beginning of the European War, jointly to Sielcken and Wille in an amount in excess of M. 3,500,000. This debt was not satisfied and in September 1915 a tripartite agreement was apparently entered into between the P-Z Company, Wille and Sielcken, under which a final settlement of the debt was not to be made until

after the war. Whether this means after peace between Germany and Great Britain, or until after peace between Germany and the United States will depend, to a great extent, on the interpretation of the agreement of September, 1915.

Sielcken, who was an American national, with large business interests in this country, Hawaii, The Philippines and Germany, apparently resided at Frankfurt, Germany, from about 1912 to the time of his death in October, 1917. He left surviving him his widow and two children, a son and daughter, each of whom is an American national. The widow and the two children returned to the United States early in 1919, and have since resided, at least the major portion of the time, in this country. 2978

The Columbia Trust Company of New York (now the Irving Bank-Columbia Trust Company) was appointed under the Last Will and Testament of Sielcken, the executor of his estate.

In December, 1918, in accordance with arrangements between Wille and the P-Z Company, which arrangements, Mr. Avery says, were made entirely without the knowledge and consent of the Sielcken Estate, the P-Z Company paid to Wille the entire amount of the joint debt. This payment was made in the form of German War Loan Bonds to the amount of about M. 1,800,000 plus cash to the amount of about M. 700,000. It is not entirely clear just what Wille did with the bonds and money involved. Apparently the first time that the Sielcken Estate knew anything about the settlement was in September, 1921, when Wille wrote Mrs. Sielcken, advising her of the situation. 2979

I told these gentlemen that if the facts as now suggested had been before the Agency prior to the withdrawal of this claim, that I felt a reasonably good chance existed for maintaining a claim under the Treaty.

Whether such a claim might be predicated on a debt due from P-Z Company, would depend, to a great extent,

1. on the terms of the agreement of September, 1915,

2980 *Exhibit A Annexed to Reply Affidavit of Harold H. Martin*

2. on the authority of Wille in December, 1918, to accept payment of debt prior to the due date, as fixed by the agreement of September, 1915.

If Wille had no authority to accept, on behalf of Sielcken, a discharge of the indebtedness in December, 1918, and if the indebtedness was one under the contract that would fall due prior to July 2, 1921, it would seem that recovery should be affected before the Commission under the Debt Agreement.

If, however, Wille was acting within his rights in ac-
2981 cepting settlement of the debt, on behalf of Sielcken, in December, 1918, I told these gentlemen that I was afraid our best chance to effect a recovery would be on the theory that the property rights and interests of claimants in Germany had been affected by the exceptional war measures of Germany, in that on payment of the debt by P-Z Company, Wille was obligated to transmit to America the Sielcken share of the proceeds. His failure to so transmit was undoubtedly due to the existence of exceptional war measures, that would have prevented Wille in Germany from sending the proceeds of the debt to the Sielcken Estate in the United States. On this
2982 phase of the claim, claimants would be entitled to recover as damages the theoretical difference between the value of the proceeds when paid to Wille in December, 1918, and their value when the exceptional war measures ceased to effect them, which latter date, it would seem, would be some date subsequent to September, 1921, when Wille wrote the Sielcken Estate.

I further told these gentlemen that if they would get together the appropriate evidence, establishing the fact that we could show basis of recovery before the Commission in Number 6207, and also in Numbers 636 and 9406, the Agency might be in a position to ask that these three claims be reinstated, in order that they might be passed on by the Commission.

These gentlemen told me that they would immediately proceed to collect the appropriate evidence as above indicated, and submit it to the Agency on as early a date

as practicable, in order that we might be in a position to know what further steps may be taken in the matter.

I further understand that it will probably be necessary to obtain a portion of the evidence, at least, from Germany. This, of course, will mean that there will be considerable delay in finally submitting the evidence.

With respect to a possible claim against Wille, based on the Debt Agreement, it may be said that the German Agency has always maintained that in claims based upon bank balances and other debts wherein was involved the question as to what is an appropriate credit within the 2984
meaning of the Debt Agreement, the credit must have been derived from a transaction, which, standing by itself would have entitled the claimant to an award thereon, had the amount not been added to increase the sum due and owing, stated as of April 6, 1917. That is, it must involve a pre-war transaction, the obligations arising from which fell due prior to July 2, 1921. If this theory were applied to the instant claim, we find that there was a pre-war obligation arising out of a debt owing from the P-Z Company, a German Corporation, to Wille and Sielcken; that had there been no further actions between the parties, the debt would have fallen due 2985
prior to July 2, 1921; that there was an agreement in 1915, whereby the payment of the debt was postponed; that the debtor anticipated the satisfaction of his obligation, by a payment of the amount owing to Wille. If Wille was empowered to accept payment, this was on the basis of the Agreement of 1915, or some Agreement prior thereto. Therefore, it would seem that the entire transaction was a pre-war one and that, although the P-Z Company may have satisfied its obligation on the date on which it did satisfy this obligation and pay the money to Wille, a German national, a debt fell due from Wille to the claimant or his legal representatives, for which the Government of Germany is obligated to pay under the Treaty.

If, on the other hand, it is established that Wille did not have the authority to accept settlement of this debt

2986 *Exhibit A Annexed to Reply Affidavit of Harold H. Martin*

in so far as relates to Sielcken's interest therein, it may be that we could establish claim on the theory that the debtor having called the debt in December, 1918, and paid it over to an unauthorized person, the creditor is entitled to consider that as a matter of fact the debt, in so far as he was concerned, was not satisfied under the German Law and that accordingly the original German debtor is still obligated to pay the amount thereof to the American creditor.

It is particularly desirable if further action is to be
2987 taken with respect to this claim for claimant to produce the agreement of September, 1915, together with correspondence that may have passed between the parties leading up to this agreement or any correspondence subsequent thereto, explaining its terms.

It will also be desirable for claimant to produce the letter of September, 1921 from Wille setting out the circumstances of the payment by the P-Z Company in December, 1918, together with any correspondence that may have passed between the claimant and Wille prior to and subsequent to the letter of September, 1921, in reference to the payment.

2988 H. H. MARTIN.

Exhibit B, Annexed to Reply Affidavit of Harold H. Martin. 2989

(Copy)

MEMORANDUM

November 21, 1928.

Re: Docket No. 8305 claim of Crossman & Sielcken, from Z. E. G.

I had a conference this afternoon with Brainard Avery, Esquire, C. D. Hamel, Esquire, and R. S. Doyle, Esquire, of counsel for claimants.

After an extended conference on the law and facts 2990
in this claim the conclusion was reached that Mr. Avery is to proceed with the suit filed on behalf of claimants under the Trading With the Enemy Act in the United States District Court for the Southern District of New York, the act of prosecution of which suit was suspended last spring pending negotiations that were under way at that time looking to a settlement of this claim and also the claim under Docket No. 8304.

However before taking further action with respect to this suit Mr. Avery is to write us a letter saying that in view of the breakdown in the negotiations last Spring looking to the settlement of this claim he proposes to now proceed with the suit. On the receipt of this letter a copy 2991
thereof will be submitted to the German Agent for his information.

These gentlemen advised me that they expected to have printed copies of their brief submitted to the Agency in time for filing with the Commission by December 20, 1928. Before the brief in final form is submitted we are to be furnished with draft thereof for such comment and changes as may be deemed appropriate.

We all agreed on the point that the preparation of the brief in this claim should in no way interfere with the progress of the suit.

We further discussed to some extent the question that the point may be raised either in the Commission or in the court that claimant should be put to his election as to which forum he desires to have his rights finally and definitely passed on. It was decided to leave the final determination of this question to the future should the point be raised.

H. H. MARTIN.

2992 **Exhibit C, Annexed to Reply Affidavit of Harold H. Martin.**

(Copy)

Telephone: Rector 1703-1704 Cable Address: Averwhit

AVERY & WHITING

100 BROADWAY

Brainard Avery
2993 Jay E. Whiting
George O. Castell

New York January 16, 1930

H. H. Martin, Esquire,
Counsel U. S. Agency, Mixed Claims Commission,
1511 K Street,
Washington, D. C.

Dear Mr. Martin:

I have to acknowledge with thanks your favor of the
2994 14th enclosing copy of the informal memorandum prepared covering the conference in the office of the United States Agent at Washington on January 9th. Your memorandum appears complete, except that it does not include the tentative negotiation for settling the indemnity given by Sielcken's German executors to Zentral-Einkaufsgesellschaft. Probably this was intentionally omitted by you, as the ZEG indemnity is, I suppose, strictly a matter to be considered and disposed of outside the purlieus of the Commission.

Sincerely yours,

BRAINARD AVERY

A/B

Exhibit D, Annexed to Reply Affidavit of Harold H. Martin. 2995

(Copy)

January 20, 1930.

Brainerd Avery, Esquire,
100 Broadway,
New York, New York.

Dear Mr. Avery:

Receipt is acknowledged of your letter of the 16th 2996
instant, acknowledging my letter of the 14th, enclosing an informal memorandum covering the conference at Washington on the 9th instant in relation to the Crossman-Sielcken claims, Docket Nos. 8304 and 8305.

I purposely did not go into the proposed settlement between the Sielcken Estate and the ZEG of the so-called indemnity agreement other than passing reference thereto as found at pages 3 and 5 of my memorandum, for the reason that this is a matter that does not appear to particularly concern either the American or German Agencies.

Very truly yours, 2997

H. H. MARTIN,
Counsel.

HHM:CMR

2998 **Exhibit E, Annexed to Reply Affidavit of Harold H. Martin.**

(Copy)

(Excerpt from letter dated 3/17-30 from Martin to Bonynge re claims of Crossman & Sielcken, Docket Nos. 8304 and 8305.)

March 17, 1930.

Dear Mr. Bonynge:

I am in receipt of your letter of the 15th instant in relation to the Crossman & Sielcken matter, Docket Nos.
2999 8304 and 8305.

The Wille claim as presented to the Commission has two aspects:

(1) involving a straight pre-war debt from Wille, based on several different book accounts, an item in excess of 6,000,000 Marks that Wille claims to have invested in bonds prior to the war but in regard to which item claimants contend that an examination of the Wille books would probably show that such investment was not made until sometime after the death of Hermann Sielcken and not until sometime subsequent to the Armistice. In the meantime it is the claimants' contention that this money
3000 was used by the firm of Wille in the course of its business;

(2) a debt claimed against the firm of Wille covering the book items with the bond depreciation claim covering the bond item above referred to. This particular phase of the claim is one against the Government of Germany and is anologous to the Estate Decision in that it is our contention that the firm of Wille on the death of Hermann Sielcken was obligated to transmit the bonds to this country in order that the liquidation might be promptly proceeded with under the New York will of Herman Sielcken and the codicil thereto that is executed in Germany not long prior to Hermann Sielcken's death.

In the conference that we had on this matter on January 9th, the proposed settlement was reached on the theory that the book accounts involved in our claim were substantially washed out by counter-accounts of Wille against Crossman & Sielcken leaving for all practical purposes the only item in the claim against Wille, the

one involving the 6,000,000 Marks worth of bonds, which claim the German Agent finally said he would recommend be settled on the basis of 60% thereof with interest from April 1, 1918.

This tentative settlement was reached on the basis that, if it fell through, it was in no manner to affect claimant's right to maintain the claim against Wille as originally filed. If this claim as originally filed is maintained it will of course necessitate going into the question of the debts owing from Wille on the book accounts, together with the questions involved in the so- 3002
called bond account. Going into the book account debts will undoubtedly also involve a determination of the book debts that Wille claims he is entitled to from Crossman & Sielcken. In other words what we are probably entitled to is the net balance, if any, on these book accounts.

The Honorable
Robert W. Bonynge,
50 Broadway,
New York, New York.

3003

One of these book accounts will unquestionably involve a determination of Wille's interest, if any, in the judgment recovered by Crossman & Sielcken against the Z. E. G. In the Z. E. G. transaction Wille claims the right to share in one-half of the profit that would accrue to Crossman & Sielcken in the handling of the Z. E. G. goods. Under the arrangement between Crossman & Sielcken and Z. E. G., Crossman & Sielcken were acting as agents for Z. E. G. and as such they used their money to buy the goods and were entitled to receive from Z. E. G. reimbursement for the cost price plus a commission of 10% plus the other expenses incident to shipment. It is this 10% commission in which Wille claims to have an interest, so that at best the interest of the Wille firm in the Z. E. G. judgment will not be very large.

I am enclosing herewith a copy of a memorandum covering our conference on January 9.

3004 **REPLYING AFFIDAVITS ON BEHALF OF MOVING PARTY.**

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H., Defendants. In Proceedings to Vacate Final Decree of December 30, 1929.	Equity No. 44-28.

3005

3006 City of New York,
County of New York, ss:

Frank C. Sterck, being first duly sworn, deposes and says:

That on September 12, 1938, Mr. Thomas E. Rhodes, a former Special Assistant to the Attorney-General who was in charge of the defense of the instant suit for the Alien Property Custodian and the Treasurer of the United States, conferred with Mr. F. J. McNamara, Special Assistant to the Attorney-General, who handed to Mr. Rhodes a copy of the affidavit of Mr. Brainard S. Avery and copies of the other affidavits filed herein on behalf of the Irving Trust Company, in which reference was made to Mr. Rhodes.

Mr. Rhodes, having conferred with this deponent and Mr. McNamara at the Department of Justice and having

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3007

examined the files of the Department of Justice and the affidavit executed by this deponent and the exhibits annexed thereto, stated that he never knew of any arrangement whereby the plaintiffs were to pay the money received in satisfaction of the decree into a joint account of Brainard S. Avery, attorney for the plaintiff, and Arthur Garfield Hays, attorney for the defendant Z. E. G.; that he did not know that the money or any part thereof was to be paid to anyone other than the plaintiffs herein, John S. Sorenson and Thorleif S. B. 3008
Nielsen, as surviving partners of the firm of Crossman & Sielcken.

Mr. Rhodes further stated that he had no independent recollection of ever having discussed this case at any time with Mr. Brainard Avery but does remember having discussed the case in the early stages thereof, before he had made a study of the case, in an informal manner with Mr. Earl B. Barnes in the Department of Justice in the early part of 1928, at which conference Mr. Avery was present, but Mr. Rhodes said that his recollection was that "Mr. Barnes did all the talking."

Mr. Rhodes further stated that local counsel for the 3009
plaintiffs, Mr. Richard S. Doyle, had conferred with him and had thereafter written to him a letter dated the 7th day of December, 1928, a copy of which letter is hereto annexed and marked Exhibit A; that it had been represented to him at all times after the receipt of said letter that by reason of the decision of Judge Neumann, of the Reich Commercial Court (Affidavit of Brainard S. Avery, Exhibit C), there was no liability whatsoever on the part of the plaintiffs to the Z. E. G.; that he had never been informed by Mr. Earl B. Barnes, Mr. Brainard S. Avery, Mr. Richard S. Doyle, or any of the other deponents that any money was to be paid to the Z. E. G. or to the enemy firm of Theodor Wille; and that the matter was first called to his attention on April 2, 1938, when he examined the files of the Department of Justice at Mr. McNamara's invitation.

3010 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

Mr. Rhodes further stated that during the trial of the case he had taken the position that the Alien Property Custodian was merely a trustee of the funds held to the credit of the Z. E. G. trust, No. 592, by the Alien Property Custodian; that the Z. E. G. was a party defendant represented before this Court by able counsel and that he relied upon such counsel, Mr. Arthur Garfield Hays, to protect the fund in the defense of the suit; that he had always thought that Mr. Hays had defended
3011 the case strenuously; that he never conferred with Mr. H. H. Martin or Mr. Bonynge of the American Agency, Mixed Claims Commission, in reference to a settlement of the instant suit or of the Memorials then pending before the Mixed Claims Commission filed against Germany and the Z. E. G. or against Germany and Theodor Wille Company; that, if he had known that any arrangements had been made to recognize any interest or claim of the Z. E. G. or of Theodor Wille in the proceeds of the suit or that any of the money paid in satisfaction of the decree was to be paid to either the Z. E. G. or to the firm of Theodor Wille, he not only would
3012 not have recommended to the Solicitor General that no appeal be taken from the decree, but instead would have raised the issue at the trial of the instant case, or would have thereafter taken appropriate steps in behalf of the United States to prevent such payments.

With reference to the affidavit of William Abramson, dated August 5, 1938, in which Mr. Abramson referred to the conference had by him in the office of Mr. Rhodes of the Department of Justice on March 24, 1930 and in which affidavit (pages 3 and 4), Mr. Abramson states: "And I believe he (Mr. Rhodes) knew that part of the settlement we had arranged was that a considerable payment was to be made to the Z. E. G. in compromise of that claim for indemnity, though I do not recall that I discussed any of the details of the settlement with him," Mr. Rhodes stated that he remembers distinctly that no discussion was had between him and Mr. Abramson, or with anyone else, with regard to any settlement whereby

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto

any part of the proceeds of the final decree entered in in this case on December 30, 1929, was to be paid to the Z. E. G. or any other German national. 3013

Mr. Rhodes further said that he remembered Mr. Abramson coming in to his office in reply to a number of letters which had been written by Mr. Rhodes to Arthur Garfield Hays, inquiring whether or not the Z. E. G. was going to appeal; that when Mr. Abramson arrived in Mr. Rhodes' office, he informed Mr. Rhodes that the Z. E. G. was not going to appeal and that he desired that the Government not appeal; that thereupon Mr. Rhodes requested that Mr. Abramson notify him in writing under the signature of Mr. Arthur Garfield Hays, the attorney of record for the Z. E. G., that the Z. E. G. was not going to appeal and that Mr. Abramson thereupon advised Mr. Rhodes that he was an associate of Mr. Hays and that if he would call in a stenographer to write a letter for him he would sign Mr. Hays' name to the same, which was done; and thereafter, on March 26, 1930, Mr. Rhodes transmitted his memorandum to the Solicitor General recommending that no appeal be taken. 3014

Mr. Rhodes further advised this deponent that at no time was any statement made by him which would serve as the basis for the deduction drawn by Mr. Abramson that he, Mr. Rhodes, knew that any part of the proceeds of the final decree of December 30, 1929, was to be paid to the Z. E. G., and that he never knew that any part of this money was paid to the Z. E. G. until April 2, 1938, when he was so advised by Mr. F. J. McNamara. 3015

Mr. Rhodes further stated, with reference to the statement in the Memorandum of Mr. H. H. Martin, set forth on page 16 of the affidavit of this deponent attached to the moving papers, to the effect that "Mr. Barnes then said that the Department of Justice through Mr. Rhodes was fully advised as to the possible settlement between Z. E. G. and the liability of the Siecken Estate under the Indemnity Agreement," that such statement by

3016 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

Mr. Barnes was not correct; that he has no recollection of discussing a compromise settlement between the German Government or the Z. E. G. and the plaintiffs, either with Mr. Barnes or Mr. Avery, in connection with the indemnity agreement, but has a distinct recollection of conferring with Mr. Barnes and Mr. Doyle in regard to a proposed stipulation as to certain material facts in the case.

Mr. Rhodes further stated that the copy of the Memo-
3017 randum of Thomas E. Rhodes, dated March 24, 1930, hereto annexed as Exhibit B and made a part hereof, is a correct copy; that he would have stated therein the facts in reference to any compromise between the plaintiffs Sorenson and Nielsen and the defendant Z. E. G., or with Theodor Wille, either under the so-called indemnity agreement or under any other agreement, if he had known of such compromise, because under such circumstances the Trading with the Enemy Act, as amended, would have precluded a return directly or indirectly to the German Government, or to the Z. E. G., as a German Government corporation, or to the firm of Theodor Wille, or to any other person, as a debt claim-
3018 ant, who was an enemy within the meaning of that term as used in said Act.

Mr. Rhodes further stated that Clara Sielcken Schwarz, widow of Hermann Sielcken, was present at the trial of this case; that, if it had been disclosed to him that Hermann Sielcken was an enemy within the meaning of the Trading with the Enemy Act, and was the owner of all the capital assets of the firm, and that the said assets passed to the executor of Hermann Sielcken upon the death of said Sielcken, he would have raised the question of the jurisdiction of this Court at the trial; that his position as attorney in this case was taken in reliance upon the fact that Mr. Hays, as counsel for the Z. E. G., was assuming the burden of the defense, and for that reason, in addition to the pressure of other litigation demanding his attention in Washington, he, Mr. Rhodes, did not give the case the attention that he otherwise would have given to it.

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3019

Mr. Rhodes further stated that since the pending motion was filed, Mr. Selden Bacon came to Washington this summer to see him about this case and that he talked to Mr. Bacon and Mr. Richard S. Doyle and that he had advised them the same as he had advised this deponent, that he knew nothing about any of the proceeds of the final decree of December 30, 1929, in this case being paid to the Z. E. G. until he was so advised by Mr. F. J. McNamara this year and that he was not going to file an affidavit for either party. 3020

Mr. Rhodes has advised the deponent that he does not desire to make an affidavit in this case, stating that he is engaged in the private practice of law and is very busy; that he would not feel justified in making a comprehensive affidavit on the case without first reading all of the pertinent records and files which he does not have the time to do, and which, if he did read them, would require a very considerable time.

Mr. Rhodes has read this affidavit and has informed this deponent that the facts stated therein regarding his alleged knowledge of this case are true to the best of his knowledge and recollection.

This deponent desires to call attention also to a letter received by the Department of Justice from Mr. H. H. Martin, counsel of the Mixed Claims Commission, United States and Germany, under date of September 21, 1938, a copy of which letter is hereto attached, marked Exhibit C, and made a part hereof. This letter calls attention to the inaccuracy of certain statements made by Mr. Avery in his affidavit executed on August 11, 1938, and filed in these proceedings to vacate decree herein. 3021

FRANK C. STERCK.

Subscribed and sworn to before me
this 10th day of October, 1938.
Isidore M. Fuchs,
Notary Public.
Bronx Co. Clk's No. 153; Reg. No. 152F40.
N. Y. Co. Clk's No. 812; Reg. No. 0 F 448.
Commission Expires March 30, 1940.
(Seal.)

3022 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

Index.

Exhibits

A Letter dated December 7, 1928, to Mr. Rhodes from Mr. Richard S. Doyle.

B Memorandum for the Solicitor General, dated March 24, 1930, signed by Thomas E. Rhodes.

C Letter dated September 21, 1938, to F. J. McNamara, Esquire, from H. H. Martin, Counsel of the Mixed Claims Commission.

3023

3024

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3025

Exhibit A.

Letter dated December 7, 1928, to Mr. Rhodes from Mr. Richard S. Doyle.

9-17-9-9394
May 24, 1929

HOPKINS, STARR, HOPKINS & HAMEL

LAWYERS

3026

Southern Building

WASHINGTON, D. C.

Telephone Franklin 630

December 7, 1928.

Re: JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

v.

HOWARD SUTHERLAND, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,

District Court of the United States for the Southern District of New York.

3027

Equity No. 44-28.

Thomas E. Rhodes, Esq.,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

Sir:

In accordance with your suggestion made at a conference with you, Mr. Alger and myself, on November 28th, I write you this letter of explanation to accompany

3028 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

the proposed stipulation and documents in this action.

It is, as we told you, our intention to press this case for early trial. The documents as to which stipulation is sought are all part of the record of the Mixed Claims Commission, and a brief reference to the Mixed Claims Commission proceeding in which substantially a similar issue is presented is pertinent. As you will observe by the Memorial, List No. 636, Docket No. 8305, copy of which with its exhibits accompanies this letter, the
3029 present plaintiffs therein make certain allegations of fact in certain numbered paragraphs. The German Government has made a reply recently filed to this Memorial, copy of which with its exhibits, also accompanies this letter. You will note that the allegations of fact contained in our Memorial are not disputed as to any matters or as to any documents concerning which stipulation is sought. In the answer of Germany, it questions whether Mr. Sielcken was in fact a resident of the United States temporarily residing in Germany, or whether Mrs. Sielcken was such, and as to the effect of his New York will to Columbia Knickerbocker Trust
3030 Company as Executor. These matters of dispute relate only to the allegations of paragraphs (1) to (4) of our Memorial, and as to these matters stipulation is not sought.

Now, considering the subsequent paragraphs, you will note by Germany's answer that the allegations of items (8) to (17) of the Memorial are not disputed, except that Germany states (see page 6 of its answer) that we omit to make mention of a certain arbitration and interlocutory decision on which a compromise was concluded, which Germany claims is binding upon us and which compromise they claim was by implication ratified by Messrs. Sorenson and Nielsen, at a later date (page 12). Omitting the consideration of this compromise matter for the moment, Germany's answer does not dispute the authenticity of any of the documents attached to our Memorial, or the correctness of the statement of facts therein. As Zentral-Einkaufsgesellschaft

3031

was but a branch of the German Imperial Government, there is no substantial difference between Zentral-Einkaufsgesellschaft and German as to these issues. These documents, therefore, covered by the stipulation are not matters of dispute and are concededly correct, and it would be a useless waste of your time and the time of the court to require formal proof concerning them.

So far as the allegations of paragraphs (15) and (16) of the Memorial are concerned, the figures given by 3032
which the net amount of $380,761.54 is reached, are likewise covered by affidavit and by specific figures of our accountant, Mr. Martin, taken from the books of Crossman & Sielcken. These also are not disputed, but if you feel that it is desirable to have these figures checked by someone on your behalf, the books are here with the Mixed Claims Commission and available for that purpose.

So far as the contract which forms the basis of our suit is concerned, this is, as stated before, not subject to dispute. It will not be questioned that the letter referred to as "A" in the stipulation is the letter on 3033
which these goods were shipped. Dr. Kiesselbach himself was one of the arbitrators in the arbitration to which the German Government refers in its answer and the statement of fact in the arbitration report shows this letter to be the contract offering made to Sielcken by Reichseinkauf and continued by Zentral-Einkaufsgesellschaft, its successor, subject to a modification also not in dispute and which is covered by proposed letter "B" of the stipulation.

Now a word as to the alleged arbitration and compromise:

We are furnishing you herewith, for your information, copy of opinion rendered by Dr. Neumann, a Judge of the Commercial Court of the Reich. Negotiations for a settlement of this matter were instituted at the suggestion of certain officials of the German Foreign Office. Mr. Avery went to Berlin and it was suggested

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that the opinion of the Minister of Justice be taken on this subject. Instead, by agreement, the question was referred to Dr. Neumann, a distinguished Judge of that court, for an opinion. This was done. Dr. Neumann has held that the alleged compromise relied on in the answer of German was void, owing to the personal interest of two of the executors in the subject-matter of the arbitration. Other reasons are also afforded for avoiding the compromise as an entirety. The
3035 alleged compromise being void any subsequent agreement of the executors based thereon falls with it. This, however, is not as we see it a pertinent matter in the Federal action, Zentral-Einkaufsgesellschaft not having appeared or made any answer therein.

As we view the present action, it presents mainly a question of law upon an indisputable state of facts. It would be a waste of the court's time, as well as your time and ours, to require the production of evidence on facts which are not disputed. It is highly important that the issues arising in this suit be determined at the earliest possible moment, and we desire to proceed with all possible speed to an adjudication of this court upon
3036 these issues.

If there are any matters connected with the foregoing or with the documents submitted which can be simplified to you by a personal conference, I shall await your convenience for a meeting for that purpose.

I remain,

Very truly yours,

R. S. DOYLE.

RSD:G

(Stamped): Department of Justice May , 1929 P. M. Mail and Files Division C Farnum-Rhodes.

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3037

Exhibit B.

Memorandum for the Solicitor General, dated March 24, 1930, signed by Thomas E. Rhodes.

Address Reply to
"The Attorney General"
and Refer to
Initials and Number
9-17-9-9394
No Appeal
C. E. H. Jr.
March 29, 1930

I concur.
J. FRANK STALEY

3038

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

March 24, 1930.

MEMORANDUM FOR THE SOLICITOR GENERAL.

(Through Mr. Staley)

In Re: Sorenson & Nielsen v. Sutherland, et al.

3039

Office of
Received
Mar 26 1930
Solicitor General

(Stamped): Apr 1 1930

Time for Appeal Expires on April 2, 1930.

The question presented by this memorandum is whether or not an appeal should be taken by the Alien Property Custodian and the Treasurer of the United States from the final decree entered in favor of the plaintiffs in the above entitled case on January 2, 1930.

This suit was instituted in the United States District Court for the Southern District of New York by John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, against the Alien Property Custodian and the Treasurer of the

3040 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

United States, to which suit the Zentral Einkaufsgesellschaft, m. b. H. was made a party defendant, to recover a debt of $380,761.54, with interest thereon since 1915, alleged to be due and owing to the plaintiffs by said Zentral Einkaufsgesellschaft. The record clearly establishes the fact that the Zentral Einkaufsgesellschaft (formerly called the Reichseinkauf) was the purchasing agent of the Imperial German Government during the World War and was an agency and instrumentality of the German Govern-
3041 ment. The evidence also shows that the Zentral Einkaufsgesellschaft had several hundred thousand dollars in the United States at the time of the enactment of the Trading with the Enemy Act on October 6, 1917, and said money was duly seized by the Alien Property Custodian as the property of said Zentral Einkaufsgesellschaft and deposited in the Treasury of the United States in the name of said Zentral Einkaufsgesellschaft. There is now held in the Treasury of the United States in the name of said Zentral Einkaufsgesellschaft more than sufficient money to satisfy the decree in favor of the plaintiffs in the above entitled case.

3042 It appears from the record, and the Court in its opinion found as a fact, that Crossman & Sielcken were employed in September, 1914, by the Reichenkauf (later called the Zentral Einkaufsgesellschaft) to purchase certain food supplies in the United States for the German Government and that Crossman & Sielcken, who had their office and place of business in New York City, purchased several shipments of food supplies which were duly shipped to Germany in 1915. Several of the shipments were captured by the British and condemned in the British Prize Courts as prizes of war. As to the consignments which were captured by the British the Zentral Einkaufsgesellschaft refused to pay Crossman & Sielcken therefor, claiming that title did not pass and no liability ensued on the part of said Zentral Einkaufsgesellschaft until the goods should be delivered at a Baltic seaport. Crossman & Sielcken and their successors, Sorenson & Nielsen, the plaintiffs herein, have always contended that the title passed when the goods were placed on board the vessel

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3043

in New York and that the liability of the consignee arose when the goods were placed on board the vessels in New York.

The enemy, Zentral Einkaufsgesellschaft, which was made a party defendant along with the Alien Property Custodian and the Treasurer of the United States employed counsel (Mr. Arthur Garfield Hays of New York) who vigorously contested the case on behalf of said defendant. I represented the Alien Property Custodian and the Treasurer of the United States and Mr. Hays and I 3044
cooperated fully and presented every pertinent point we could discover on behalf of the defendants. The case was heard by Judge Caffey for two days and at the conclusion of the hearing he delivered an oral opinion which was taken down in shorthand and which will be found at the end of the Transcript of Record attached hereto in which he decided in favor of the plaintiffs.

I have gone over this Record very carefully and am convinced that the decision of the Court is correct; that Crossman & Sielcken, of New York, were undoubtedly employed by the Zentral Einkaufsgesellschaft, the purchasing agency of the German Government, prior to the entrance of the United States into the World War to 3045
purchase supplies for the German Government; that Crossman & Sielcken, with their own partnership funds, purchased said supplies, and that they have never been reimbursed by anybody; that the title to the goods passed to the consignee, the Zentral Einkaufsgesellschaft, when they were placed on board the vessels in New York, and that the Zentral Einkaufsgesellschaft was indebted, prior to October 6, 1917, the date of the enactment of the Trading with the Enemy Act, to the plaintiffs herein in the amount of $380,761.54. The plaintiffs being citizens of the United States and non-enemies within the meaning of the Trading with the Enemy Act and their debt having arisen prior to October 6, 1917, are clearly entitled to recover the same out of the funds of the debtor held by the Custodian in the Treasury of the United States pursuant to the provisions of Section 9 (a) of the Trading with the Enemy Act.

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There is attached hereto a letter from Mr. Arthur Garfield Hays, dated March 24, 1930, in which he states that the Zentral Einkaufsgesellschaft will not take an appeal from the final decree entered in this case.

Inasmuch as the decision in this case is undoubtedly correct and as the enemy defendant has decided to take no appeal, there is no reason for the Alien Property Custodian and the Treasurer to take an appeal.

I, therefore, recommend that no appeal be authorized.

3047

Respectfully submitted,

THOMAS E. RHODES,
Special Assistant to The Attorney General.

Enclosures

Bill of Complaint,
Motion to Dismiss and Answer of APC and Treas.,
Answer of the Defendant, Zentral Einkaufsgesellschaft, m. b. H.,
Stipulation of Plaintiffs and U. S. Attorney,
Stipulation of Defendant, Zentral Einkaufsgesellschaft,
3048 Supplemental Stipulation of Plaintiffs, and Zentral Einkaufsgesellschaft,
Transcript of Record,
Final Decree,
Letter of Mr. Arthur Garfield Hays, dated March 24, 1930.

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3049

Exhibit C.

Letter dated September 21, 1938, to F. J. McNamara, Esquire, from H. H. Martin, Counsel of the Mixed Claims Commission.

MIXED CLAIMS COMMISSION

United States and Germany

3050

UNITED STATES AGENCY

Department of State

Washington

September 21, 1938.

Department of Justice
Alien Property Bureau
Received Sep 22 1938
Noted ..... Date .....
Ans'd ..... Date 3051

F. J. McNamara, Esquire,
Department of Justice,
Washington, D. C.

Dear Mr. McNamara:

Reference is made to our conversation on the 14th instant in relation to the Crossman & Sielcken matter, at which time you gave me a copy of Mr. Avery's affidavit of August 11, 1938, as filed in the proceedings in the United States District Court, Southern District of New York, equity No. 44-28.

I have been reading over rather carefully Mr. Avery's affidavit. The statement contained in the first paragraph at page 43 in relation to Mr. Bonynge's being present at a conference had in Washington on March 17, 1930, in relation to the Crossman & Sielcken claims then pending

before the Commission is inaccurate. Mr. Bonynge was not in Washington at the time and did not attend the conference. This is evidenced not only by my memorandum of March 17, 1930, covering the conference, but also by my letter of March 18, 1930, to Mr. Bonynge in New York sending him a copy of the memorandum.

The statement in the paragraph beginning at the bottom of page 43 purporting to quote a statement said to have been made by me to Mr. Avery is likewise inaccu-
3053 rate. I have no recollection of making a statement of this specific character nor am I able to find among the Agency records any record of such a statement. I may well have conveyed to Mr. Avery a message from the German Agent that he, the German Agent, would like to talk with Mr. Avery in relation to the settlement and have suggested to Mr. Avery that so far as the Agency was concerned there was no objection whatsoever to his conferring further with the German Agent in relation to working out details of the settlement. I am certain that I did not tell Mr. Avery that it was "unusual for the German Agent to have personal conferences with counsel for claimants." Such procedure was not "unusual,"
3054 particularly where such conference was requested by the German Agent.

Sincerely yours,

H. H. MARTIN,
Counsel.

Second Supplementary Affidavit of Frank C. Sterck, Verified October 25, 1938 and Exhibit. 3055

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL-EINKAUFS GESELLSCHAFT m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

3056

Equity No. 44-28.

City of Washington,
District of Columbia.

Frank C. Sterck, being duly sworn, deposes and says: 3057

That he is an Attorney in the United States Department of Justice.

That heretofore, namely, on the 10th day of October, 1938, deponent executed a supplementary affidavit with reference to certain statements made to him by Mr. Thomas E. Rhodes, former Special Assistant to the Attorney-General, who represented the Alien Property Custodian at the trial of this case in this Court in 1929;

That said affidavit has been served upon opposing counsel and filed herein on behalf of the Government at the argument of the motion to vacate the decree herein on October 11, 1938;

That on October 19th, 1938, the deponent received a letter dated October 18, 1938, from Thomas E. Rhodes, attorney at law, Southern Building, Washington, D. C., the original of which is on file in the Department of Jus-

3058 *Second Supplementary Affidavit of Frank C. Sterck, Verified October 25, 1938, and Exhibit*

tice, Washington, D. C., a photostatic copy of which is hereto annexed and made a part hereof.

FRANK C. STERCK.

Sworn to before me this
25th day of October, 1938.
Sophie D. Freeman,
Notary Public.
My Commission expires October 15, 1940.
3059 (Notarial Seal)
(Clerk's Certificate No. 98064.)

Exhibit.

Letter from Thomas E. Rhodes of October 18, 1938.

(Department of Justice
Alien Property Bureau
Received Oct. 19, 1938
Noted ..... Date .....
3060 Ans. ..... Date .....)

9-17-9-9394

Tel. National 2263

(Department of Justice
Oct. 19, 1938 A. M.
Division of Records
Claims Div.)

THOMAS E. RHODES
Attorney at Law
Southern Building
Washington, D. C.

October 18, 1938.

Frank C. Sterck, Esq.,
3rd Floor,
Department of Justice
Ninth Street and Pennsylvania Avenue, N. W.
Washington, D. C.

Second Supplementary Affidavit of Frank C. Sterck, Verified October 25, 1938, and Exhibit 3061

Dear Mr. Sterck

On October 13, 1938, you and Mr. F. J. McNamara informed me in your office that in an argument before Judge Goddard of the United States District Court for the Southern District of New York on October 11, 1938, Mr. Selden Bacon stated that he had talked with me on the long distance telephone that morning and that I had stated that your affidavit filed on October 11, 1938, in the case of Sorenson and Nielsen vs. Sutherland, et al., Equity No. 44-28, "was filled with lies." I beg to 3062
advise you that I never made any such statement to Mr. Selden Bacon or any one else. I did not talk with Mr. Selden Bacon on October 11, 1938, by telephone or otherwise. I have no recollection of ever having talked to him on the telephone in my life. I know I have not seen or talked with him since on or about July 30, 1938, when I was with him for a short while at lunch in company with Mr. Richard S. Doyle at the University Club in Washington.

My secretary advises me that late in the afternoon of October 10, 1938, a New York telephone operator called my office and asked for me and my secretary advised her 3063
that I was not in the office and said operator asked my secretary where I could be located, and my secretary gave her my home telephone number. I did not go home from my office that evening but went out to dinner and spent the evening in company with a young lady and did not return to my place of abode until after midnight. Whether Mr. Bacon tried to contact me at my home that night or not I have not been able to ascertain.

The next morning Mr. Richard S. Doyle of Washington, D. C., called my office and asked for me, but I was not in as I went to the Court House that morning. He then asked my secretary if I had received a telephone call from Mr. Bacon the day before and she told him that I was not in when someone from New York tried to get me. Later in the morning Mr. Doyle called again and I still had not returned to the office. When I did return late on the morning of October 11th, I called Mr.

3064 *Second Supplementary Affidavit of Frank C. Sterck, Verified October 25, 1938, and Exhibit*

Doyle and he told me that Mr. Bacon had been trying to get in touch with me and wanted to talk to me about your affidavit, but he (Mr. Doyle), did not seem to know just what Mr. Bacon wanted to talk about as he (Mr. Doyle) had not seen the affidavit.

I thereupon told Mr. Doyle that I had seen a draft of your affidavit before it was filed and that I had suggested certain corrections and changes therein and that thereafter I had seen a copy of the final draft of your
3065 affidavit after said corrections and changes had been made and that to the best of my knowledge, information and belief the statements made in your affidavit were true, and I still think that your said affidavit is a fair statement of the situation according to the best of my knowledge, information and belief.

I was a special assistant to the Attorney-General of the United States from January 1, 1922, until June 24, 1933, engaged upon duty in the Alien Property Division of the Department of Justice and I represented the Alien Property Custodian and the Treasurer of the United States in the trial of the aforesaid case in the District Court of the United States for the Southern District of
3066 New York in December, 1929, and I prepared the final decree in that case. My recollection is that Mr. Dean Hill Stanley, who preceded me, in charge of Alien Property cases in the Department of Justice, prepared the answer of the Alien Property Custodian and Treasurer of the United States to the amended bill of complaint.

It is my recollection that the primary question involved in that case was whether or not the title to certain cargoes passed from the plaintiffs to the Zentral Einkaufs Gesellschaft at the time the goods were placed on board ship in the New York Harbor or at the time of their delivery at a Baltic seaport. Mr. Arthur Garfield Hays entered an appearance for the Zentral Einkaufs Gesellschaft and filed an answer on behalf of said defendant. He conferred with me a number of times before the trial and I always thought that he defended the case in good faith, and vigorously, too, and did

everything he could to defeat the plaintiffs. At no time during the progress of that case and before the final payment of the proceeds of the final decree of December 30, 1929, did I know of any plan, agreement or understanding by which any part of the proceeds of said decree would be paid to any alien enemy. If I had known of any such plan, I would most certainly have brought the matter to the attention of my superior officers in the Department of Justice.

From about 1926 until the time I left the Department 3068
of Justice I passed upon many thousands of claims and handled hundreds of cases in the Courts and in every instance I endeavored to see that all of the rights of the United States were protected, and in the handling of so many thousands of matters there may have been instances where I erred in judgment but I think you will find that in almost every instance where any error was made it was made in favor of the government.

I have no interest in this case and I have not filed an affidavit on behalf of either party for the reason as stated by you in your affidavit that I have not had time to study the entire record sufficiently to feel justified in making a comprehensive affidavit on the entire case. 3069

At the time I had this case under consideration I had no knowledge of many facts that are now asserted by the Department of Justice, but I am frank to say that if I had known about them I would most certainly have brought them to the attention of my superior officers in the Department of Justice while the case was pending and before the final disposition thereof.

In view of the aforesaid statement attributed to Mr. Selden Bacon, I feel that in fairness and justice to you I should send you this letter.

With kindest regards, I am,

Very truly yours,

THOMAS E. RHODES.

3070 **REBUTTING AFFIDAVITS FOR IRVING TRUST CO., AS EXECUTOR.**

Affidavit of George E. Warren, Verified September 23, 1938.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of
3071 the firm of Crossman & Sielcken,
Plaintiffs,

against

HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL-EINKAUFS GESELLSCHAFT m. b. H.,
Defendants.

Equity No. 44-28.

In Proceedings to Vacate Final Decree of December 30, 1929.

3072 State of New York,
County of New York, ss:
Southern District of New York,

George E. Warren, being duly sworn, says:

That he has examined Exhibit 5 of the replying affidavit of Mr. Sterck herein, verified the 15th day of September, 1938.

As to the first paper in that Exhibit 5 (which has no other number but is described as "Designation of Depositary, dated December 31, 1917") deponent has no recollection of ever having seen any such paper or of any such designation having been made. The paper on its face fails to show that it was ever delivered or that it was ever accepted.

As to the designation of depositary No. 5-a of July 30, 1918, deponent believes that that document, which

Affidavit of George E. Warren, Verified September 23, 1938 3073

includes four sheets, was delivered to the Trust Company but that the same was not a designation of the Columbia Trust Company as depositary of any particular funds but only a general appointment, qualifying it to serve if it should be appointed depositary of any particular fund by the Alien Property Custodian, and deponent believes that the bond, of which a copy is set forth as Exhibit 5-b was given, but this again does not refer to any particular funds but was simply a general bond to be responsible for any funds which should be deposited with the Trust Company as such depositary. 3074

As to the document Exhibit 5-c of that affidavit of Mr. Sterck's, deponent never received any such document and believes that none ever came to the Trust Company; and deponent calls attention to the fact that the paper, on its face, is not completely executed.

As to the document, Exhibit 5-d of that affidavit, which purports to be a designation of the Columbia Trust Company as depositary of the property of Hermann Sielcken, deceased, deponent never saw any such paper, and if it had come to his attention in 1918 deponent would promptly have called attention to the fact that the Custodian had no power to designate the Columbia Trust Company as depositary of that estate since the title to the property had vested in the executor, which had been previously acknowledged by the Alien Property Custodian. Deponent further calls attention to the fact that there is no affidavit or other proof showing that any such paper was sent to the Columbia Trust Company, and that the paper is marked on its face "Nixed." 3075

As to the document, Exhibit 5-e, of date October 19, 1918, deponent recalls that such a paper was delivered to the Trust Company, but was subsequently cancelled in April, 1921, as to the interest of Mrs. Sielcken and her property. The other legacies lapsed and the Trust Company never received anything as depositary under that instrument.

As to Exhibit 6 of that affidavit of Mr. Sterck's, deponent says that none of these papers was ever received

3076 *Affidavit of George E. Warren, Verified September 23, 1938*

by the Columbia Trust Company from the Alien Property Custodian's office, and deponent never had any knowledge thereof, and that there is no suggestion in the affidavit of Mr. Sterck that any of them ever was sent to the Trust Company.

GEORGE E. WARREN.

Subscribed and sworn to before me
this 23rd day of September, 1938.
William G. Phillips.

3077 William G. Phillips,
Notary Public,
Nassau Co., N. Y. No. 1021.
Certificate filed in N. Y. Co. No. 108.
N. Y. County Register's No. 0-P-63.
My Commission Expires March 30, 1940.

(Notarial Seal)

3078

Affidavit of Brainard Avery, Verified September 22, 1938. 3079

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL-EINKAUFS GESELLSCHAFT m. b. H., Defendants.	Equity No. 44-28. 3080
In Proceedings to Vacate Final Decree of December 30, 1929.	

State of New York,
County of New York, ss:
Southern District of New York,

Brainard Avery, being duly sworn, deposes and says: 3081

That he has read the replying affidavits of Mr. Frank C. Sterck and of Harold H. Martin.

Deponent further says that the letter, Exhibit 3, dated March 1, 1915, never came to deponent's attention in any way nor did deponent know anything about the same until perusing the said affidavit of Mr. Sterck verified the 15th day of September, 1938.

Deponent further says that the same is true of the documents embodied in Exhibit 5 of the said affidavit, and deponent has no recollection of ever having seen the originals of any of the papers constituting Exhibit 6 of that affidavit until the examination of Mr. Sterck's affidavit on September 21, 1938.

Deponent further says that all the contents of the letter from Mr. Martin to Mr. Bonynge of March 17, 1930, excerpts of which are put in as Exhibit E of Mr. Martin's

affidavit, were entirely unknown to this deponent until September 21, 1938; that the matter stated in the paragraph of those excerpts beginning "one of these book accounts" and ending "will not be very large" indicates to deponent that Mr. Martin had had some conference with Dr. von Lewinski, the German Agent, or some member of his staff, with regard to the claim of Wille after the conference of March 17, 1930, which was not communicated to this deponent; and the fact that Wille would be apt to make a claim for half of the commission of Crossman & Sielcken on the cargoes was not communi-
3083 cated by anyone to deponent at any time after 1928.

It is true that if no settlement was arrived at of the claim under the Wille Memorial, all features of the accounts would have had to be tried; but no such claim as Mr. Martin describes in that letter to Mr. Bonynge was asserted in the Wille answer to that Memorial (Exhibit C of original affidavit of Selden Bacon). And the claim of Wille that all matters involved in the accounts (other than the claim on account of the 8,000,000 Marks of bonds) balanced each other, was made the basis of settlement of the Wille Memorial, as is shown in the Minutes of Martin of the meetings of January 9th, 1930, and March 17th, 1930.

3084 The only statement that was made to deponent after 1929 as to the nature of any claim that might be asserted by Wille, was that made by Mr. Hays to deponent, that Wille was threatening to assert some kind of a substantial claim in Germany against the property of the Sielcken estate in Germany, the nature of which Mr. Hays said he did not know.

BRAINARD AVERY.

Subscribed and sworn to before me
this 22nd day of September, 1938.
James S. Ogsbury, Jr.,
Notary Public,
Nassau Co., N. Y. No. 1870.
Certificate filed in N. Y. Co., No. 180.
N. Y. County Register's No. 0-O-105.
My Commission expires March 30, 1940.
(Seal)

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto. 3085

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

3086 Equity No. 44-28.

State of New York,
County of New York, ss:
Southern District of New York,

Selden Bacon, being duly sworn, deposes and says: 3087

That he is one of the solicitors for the Irving Trust Company as Executor of Hermann Sielcken, deceased, in this proceeding to vacate decree.

Deponent further says that he has examined with care the affidavits of Mr. Sterck and Mr. Martin served in reply and is familiar with the contents thereof.

Deponent calls attention to the curious misapprehension contained in the replying affidavit of Mr. Sterck as to the affidavits submitted in answer, particularly as to the affidavit by Mr. Avery.

Mr. Sterck asserts that the affidavit of Mr. Avery attempts to establish.

1) that the Wille claim to participate in the Z. E. G. recovery was settled and discharged before 1927 and that the $50,000 payment to Wille was made on unknown grounds:

3088 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

2) that suit in the names of Sorenson and Nielsen was proper; and

3) that payment to the Zentral Einkaufs-Gesellschaft was in compromise of the indemnity agreement.

Mr. Sterck seems to overlook the fact that the affidavit of Mr. Avery goes very much further than this and shows not only that all the facts in the case were made known to Mr. H. H. Martin and to Mr. Rhodes, but that nothing was concealed from them, and these statements
3089 are fully supported by the affidavits of Mr. Doyle and Mr. Abramson and by numerous contemporaneous documents, annexed as Exhibits; and now, in turn, by the replying affidavit of Mr. Martin, and Mr. Avery's affidavit contains, in addition, a complete rebuttal of all the innuendoes of fraud on the part of the claimants and the executor, in securing the decree.

Mr. Sterck also asserts that it is admitted that Wille had a half interest in the cargoes and in the claim against Z. E. G. The executor does not admit that Wille ever owned a half interest in the cargoes or in the claim against Z. E. G.

3090 The documents in evidence establish conclusively that the firm of Theodor Wille was not a party to the agreement between Crossman & Sielcken and the Reichseinkauf-Gesellschaft, later assumed by the Zentral Einkaufs-Gesellschaft. The only statement of Wille's interest in any of the contemporaneous documents that we have been able to find, consists of six words in the letter from Hermann Sielcken to John S. Sorenson, of September 22, 1914 (Exhibit E of Sterck's original affidavit), in which Sielcken says: "Wille share the risk with us." How they were going to share it does not affirmatively appear; but the same letter is certainly clear that there was no idea that Wille was to have any interest in the cargoes themselves; and, apparently, it was at most an independent indemnity agreement that Sielcken concluded with Wille, the exact terms of which he did not disclose. But apparently it was an independent agreement that Crossman & Sielcken would pay Wille one-half of any

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto

profits they made, and would be paid by Wille half of any losses that might be sustained by Crossman & Sielcken in the transacton. 3091

It is true that in the Memorial of 1922 it was asserted that Wille had a half interest in those cargoes, but no evidence was introduced there in support of that allegation; and that Memorial was withdrawn in February, 1924.

There was a statement, at one time by Mr. Sorenson, that Wille had such an interest, but Sorenson testified in 1934 in Matter of Sielcken that he had never seen Sielcken since Sielcken's sailing to Europe in early 1914, months prior to the inception of the cargoes matter; and Sorenson seems to have been in that instance simply stating an inference he had drawn, which inference he later withdrew on fuller knowledge of the facts. 3092

The statements of Mr. Sterck as to the books of Crossman & Sielcken (which are in the possession of deponent and have been for several years last past) are quite incorrect. The transaction was not originally entered as on "Joint Account." True, the caption of the account now so reads, but in the Surrogate's Court proceeding in "Matter of Sielcken," it was conclusively shown by the testimony of Mr. Sorenson, that the words "Joint Account" were written in long afterwards, in 1917, on the ledger. 3093

Excerpts from Mr. Sorenson's testimony in Matter of Sielcken in the Surrogate's Court, covering his entire testimony on the subject, are hereto annexed, marked Exhibit C, and hereby made a part of this affidavit. Deponent conducted most of such examination of said Sorenson, and believes what Sorenson then testified to be true.

Deponent annexes hereto photostatic copies of the Copenhagen cargoes account on the ledgers of Crossman & Sielcken, Exhibit A hereof being a photostatic copy of that account on page 710 of Brazilian Ledger J, which was in use up to December 31st, 1916, and Exhibit B being a photostatic copy of the same account on page 916 of

3094 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

Brazilian Ledger K, which ledger was in use from and after January 1, 1917.

There is no evidence even tending to show that Wille had a half interest in the cargoes, or any direct interest in the claim against the Zentral Einkaufs-Gesellschaft, other than the six words in the letter of Sielcken above quoted, which say only that Wille shares the risk, except for these statements of conclusions of Sorenson, who, admittedly, had no personal knowledge of the matter, and had never seen the agreement with the Reichseinkauf-
3095 Gesellschaft (which was succeeded by the Zentral Einkaufs-Gesellschaft), and which conclusions Sorenson later withdrew.

If there were no settlement and the Wille Memorial had to be tried on its merits including all the items in the various Wille accounts kept by Crossman & Sielcken, it was obvious that the charges against Wille (made in 1917) on account of the Copenhagen cargoes would be involved in the accounting, and if they were sustained a rival claim by Wille for half of the profits would be forthcoming. Mr. Martin's letter to Mr. Bonynge of March 17, 1930, of which excerpts are annexed to Mr.
3096 Martin's affidavit as Exhibit E apparently refers to that dispute, and not to any claim made by Wille in 1930.

Mr. Sterck also asserts that the executor reversed its position in 1924 about Mrs. Sielcken's settlement with Wille in 1922. In 1922, when that settlement was first brought to the attention of the Trust Company, there were outstanding claims in litigation against the Executor, of the Woolson Spice Company for something over $1,125,000, and of Mrs. Blackwell for half of the net estate. With those heavy claims pending against the estate, it was quite impossible for the executor to approve or confirm a settlement made by Mrs. Sielcken, that might prejudice those other parties in interest in the estate. The executor had to guard the interests of these creditors.

By the end of 1923, both these claims of the Woolson Spice Company and of Mrs. Blackwell had been finally

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto

3097

settled and disposed of and Mrs. Sielcken became then the only person interested in the estate. Owing to that change of circumstance, it was entirely proper for the executor to adopt a settlement that had been made in 1922 by Mrs. Sielcken Schwarz since she had become the only person beneficially interested in the estate. It was not a change of mind on the part of the executor, but a change of circumstances which warranted the executor's adopting the settlement made by Mrs. Sielcken and canceling the claim against Wille, withdrawing the 1922 Memorial with regard to that claim, which had been filed with the express understanding with Mrs. Sielcken Schwarz that once the outstanding claims of the alleged creditors of the estate and alleged right to participation therein, were finally disposed of, the claim should be withdrawn, as it was after they were so disposed of. A copy of the letter declaring this arrangement before the 1922 Memorial was filed, is embodied in the affidavit of Mr. Leonard B. Smith on page three thereof.

3098

Mr. Sterck also quotes at great length from a brief prepared and filed by this deponent before the Surrogate for New York County in Matter of Sielcken in late 1935. Mr. Sterck apparently seeks to intimate that all the facts asserted in that brief were known to the plaintiffs in this suit and to the executor at the time that this suit was brought and prior to the entry of decree herein on December 30, 1929.

3099

In point of fact, the facts mentioned in that brief on which Mr. Sterck relies first came to the attention of the executor and of this deponent, as its attorney in the Sielcken matter, only in 1934, over four years after the entry of the decree herein and nearly four years after payment of the judgment herein rendered; and they were then discovered by deponent through examination of the papers in the files of the Mixed Claims Commission in connection with the Memorial against Z. E. G., with which, of course, Mr. Martin was thoroughly familiar, and copies of which papers were sent to Mr. Rhodes in December, 1928, by Mr. Doyle. These papers first came

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to the attention of Mr. Avery and constructively to that of the two plaintiffs and the executor in 1928, and were filed with the Mixed Claims Commission more than a year before this suit was tried. After examining these files of the Mixed Claims Commission, deponent, in 1934, made search in Europe through foreign attorneys for the papers referred to in the Zentral Einkaufs-Gesellschaft's Exhibits filed with its answer to the Memorial before the Mixed Claims Commission, and finally succeeded in locating the papers in the proceedings begun by Mr. Sielcken
3101 in 1914 for renaturalization as a German, in the town of Rastatt, in Baden, Germany, and after considerable difficulty secured certified photographic copies thereof in 1935.

There were apparently but two places in Germany where such papers could have been filed, one in or near Hamburg, where Mr. Sielcken was born, the second at or near Baden-Baden, where Mr. Sielcken had his great place "Mariahalden" and was, in 1914, at least temporarily, resident.

Deponent first learned that there were no such papers in the Hamburg district, and then by search found that
3102 those papers would originally in due course have been filed in Baden-Baden, but that all the records of that court for Naturalization had been removed, after 1914, to Restatt, in Baden. Deponent traced out and found those papers and secured copies thereof, starting in 1934 with no more information on the subject than was already in the hands of both Mr. Martin and Mr. Rhodes in 1928.

It was, of course, known to all the parties and to all the counsel in this suit, both at the time of the trial and long before, that Sielcken had been staying in Germany, generally in Baden-Baden, at all times from 1914 till his death on October 8th, 1917. Those facts were fully brought out at the trial of the case and discussed by counsel and the court. Whatever bearing they had on any question of jurisdiction was thus determined by the Court in rendering its decree, and that determination was conclusive, except only on appeal therefrom.

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto 3103

At page 27 of Mr. Sterck's affidavit, he has taken upon himself to question deponent's statement that only since the filing of the present motion has deponent been able to inquire into the details of the presentation of the present suit, and to support his suggestion calls attention to what he calls "the surprising familiarity of Mr. Bacon with the facts relating to the status of John S. Sorenson and Thorleif S. B. Nielsen as surviving partners of the firm of Crossman & Sielcken, and their standing to maintain a suit as parties plaintiff for the purpose of recovering assets of the firm of Crossman & Sielcken." 3104

Deponent's familiarity with the facts relating to the status of John S. Sorenson and Thorleif S. B. Nielsen as surviving partners of the firm of Crossman & Sielcken and their standing to maintain a suit as parties plaintiff for the purpose of recovering assets of the firm of Crossman & Sielcken grew out of the action brought by The Chase National Bank of the City of New York as Ancillary Executor of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, the Irving Trust Company as Executor, Mrs. Clara Sielcken-Schwarz, and others, which was tried at great length in 1932 before Mr. Henry F. Wolff as Referee of the Supreme Court to hear and 3105 determine the cause. In that action, deponent acted as Trial Counsel for the Irving Trust Company as such Executor and the status of Sorenson and Nielsen as surviving partners of the firm of Crossman & Sielcken and their standing as such was directly in issue and tried at length, and that whole question investigated; so that there should be nothing very surprising in deponent's familiarity with all the facts bearing on that important issue in that case which deponent had tried and briefed in that case in 1931 to 1933; the defendant Sorenson having counterclaimed in that action, asserting that he, as sole surviving partner, was entitled to the possession and administration of all the sums recovered in this suit and under the award against Germany under the Wille Memorial of 1927. Familiarity with those facts did not involve any but the most general information

3106 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

of the proceedings in this case, or in regard to the compromise agreement of 1930, under which this judgment was paid, and the award made against Wille.

Deponent repeats that, from 1932 on, until 1936, Mr. Avery was directly opposed to deponent in proceedings instituted by Mrs. Sielcken Schwarz to vacate the decrees of the Surrogate of 1921, 1922 and 1925, approving three intermediate accounts of this executor of this estate, and during the same period both Mr. Alger and Mr.
3107 Avery were actively representing Mrs. Sielcken Schwarz in a suit brought by her in Ohio against the Woolson Spice Company and the Irving Trust Company as executor of Hermann Sielcken, deceased, and a number of other individuals in Ohio, in which Mrs. Schwarz was attempting to recover very large amounts, apparently in excess of $2,000,000, charging a negligent and collusive sale by the Executor of a great block of valuable stock, to the prejudice of the estate. Very naturally, under those circumstances, deponent was not in a position to make inquiries of these opposed attorneys into the conduct of this suit or the details of the compromise that had been entered into in 1930, eighteen months before
3108 deponent had any connection whatever with the Sielcken estate; and which were not involved in themselves in any of the various litigations so instituted against the executor by Mrs. Sielcken Schwarz, except for a claim asserted by her that the executor had been negligent in not filing the 1927 Memorials earlier, which claims were met by showing that all information with regard to there being any claim against Zentral Einkaufs-Gesellschaft, had at all times after Sielcken's death been in the possession of Mrs. Sielcken in Germany, and had never been disclosed in any way either by her or by anyone else to the executor, until May, 1927, and then only in a very indefinite way; while the claim against Wille, predicated on the bonds alleged to have been held by Wille, was a claim which, as far as the American Executor knew, had nothing to do with the firm of Crossman & Sielcken but so far as its information had

3109

extended, until 1927, was an individual claim of Hermann Sielcken against Wille, which belonged to Sielcken's German estate, in which the American Executor had no interest whatever.

Mr. Sterck has also quoted at great length from deponent's brief in Matter of Sielcken before the Surrogate with regard to the status of Sielcken. The evidence in that proceeding there commented on was evidence that first came to the attention of deponent, as already stated, in 1934 and later.

3110

Our contention on this application has not been that Sielcken was in fact a loyal American in 1917, which the facts discovered in 1934 and 1935 seem to disprove, but that at the time the suit was brought and until 1934, Messrs. Avery, Alger, Hamel and Doyle and the two plaintiffs and the American Executor all believed that he had been a loyal American, and were amply justified in so believing by the information they then had; so that there was no fraud on their part in presenting the claims. It was only in 1934 and 1935 that, in following out the clues afforded by the papers that had been in the possession of both Mr. Rhodes and Mr. Martin in 1928, the facts as to Sielcken's status mentioned in that brief were discovered by deponent.

3111

As the question of Sielcken's status was discussed at length by both counsel and court during the trial of this cause, as appears by the transcript of the Stenographer's Minutes on file in this case, and was necessarily involved in the case and decision, the decree of 1929 is final and conclusive on the question, in the absence of appeal; and cannot be questioned on any such ground by this motion, as has been repeatedly held by the United States Supreme Court.

As to the correctness of the affidavit of Mr. Avery in this proceeding, verified on the 11th day of August, 1938, deponent desires to say that every statement made in Mr. Avery's affidavit was, before the affidavit was signed, carefully compared by deponent with all available data, both documentary and the personal recollections of others; and the statements in that affidavit, as far as deponent has been able to learn, are correct.

3112 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

Mr. Martin, though making an affidavit in reply, does not contradict any of the statements made by Mr. Avery. And Mr. Rhodes makes no affidavit. Mr. Avery's affidavit is thus uncontradicted.

Mr. Sterck also expatiates on the fact, which he says is, to him, incomprehensible, that $50,000 should have been paid to Wille, whom he affects to describe *a stranger to the matter*, in order to bring about the settlement.

The description of Theodor Wille as a stranger to the
3113 litigation is inept. In the compromise that was being negotiated, there was a provision for an award on the claim against Wille before the Mixed Claims Commission for about $800,000; and Wille's signature was necessary to the compromise going through.

It was a single compromise of all three proceedings—the judgment here, the Memorial against Z. E. G. and the Memorial against Wille.

One against whose interest an award is being made, under a compromise, of about $800,000, is not aptly to be described as a stranger to the matter.

Deponent finds nothing surprising in the attitude taken by counsel for claimants that a settlement that would
3114 give them several hundred thousand dollars in excess of what they had been willing to settle for, was worth securing by giving up $50,000 of the amount provided for by the stipulation of compromise.

Deponent calls particular attention to the fact, shown by Mr. Martin's minutes, offered by the moving parties, that Dr. von Lewinski, on behalf of Wille, maintained that all claims between Wille and Crossman & Sielcken, except for the claim on account of the 8,000,000 Marks of Bonds, were completely set-off by each other; and that at no time did Wille make any claim to the executor or to the plaintiffs or to anyone representing them, either in the answer to the Memorial, or otherwise, that it had any right to participate in the recovery from Z. E. G.; but what Wille postulated in March, 1930, was a flat payment to that firm of $100,000 ($50,000 by the plaintiffs and $50,000 by the Zentral Einkaufs-Gesellschaft), as a condition of Wille's consenting to the compromise involving an award of over $800,000 against them; and the

3115

settlement went through with the entire approval of Mr. Bonynge, Mr. Martin and Mr. Rhodes, with ample information with regard to all features affecting the matter.

Mr. Sterck also in his affidavit dwells at some length on the restrictions and conditions contained in the War Trade Board's license to Sorenson and Nielsen, given in November, 1917. He omits to notice that *that* license was entirely superseded by that of January 21, 1918, which contained no such provision as that so dwelt on by Mr. Sterck. Moreover, it has long since been decided that the War Trade Board had no authority to determine whether an individual was an enemy or not.

3116

Deponent further, on behalf of the executor, objects to the admissibility and competency of private papers in the office of the Alien Property Custodian in no way communicated to the executor or to the plaintiffs as against either the plaintiffs or this executor, and particularly to the following documents annexed to the affidavit of Mr. Sterck, namely:

Letter of December 18, 1917, from Joseph A. Bower to Mr. C. E. Hunter;

3117

Letter from Mr. C. E. Hunter to Mr. Joseph A. Bower of December 19, 1917;

Letter from C. E. Hunter, addressed to New York Office, dated January 9, 1918;

Letter from Mr. Charles E. Hunter, addressed to New York Office, of February 5, 1918;

Letter to Morgan M. Mann of October 18, 1918, purporting to have been signed "Bureau of Law, by ————."

To the copy of a designation of the Columbia Trust Company generally as a depositary of the Alien Property Custodian, of date December 31, 1917, as there is no reference therein to either Hermann Sielcken or Crossman & Sielcken and no intimation of any delivery or acceptance of the appointment;

Exhibit A

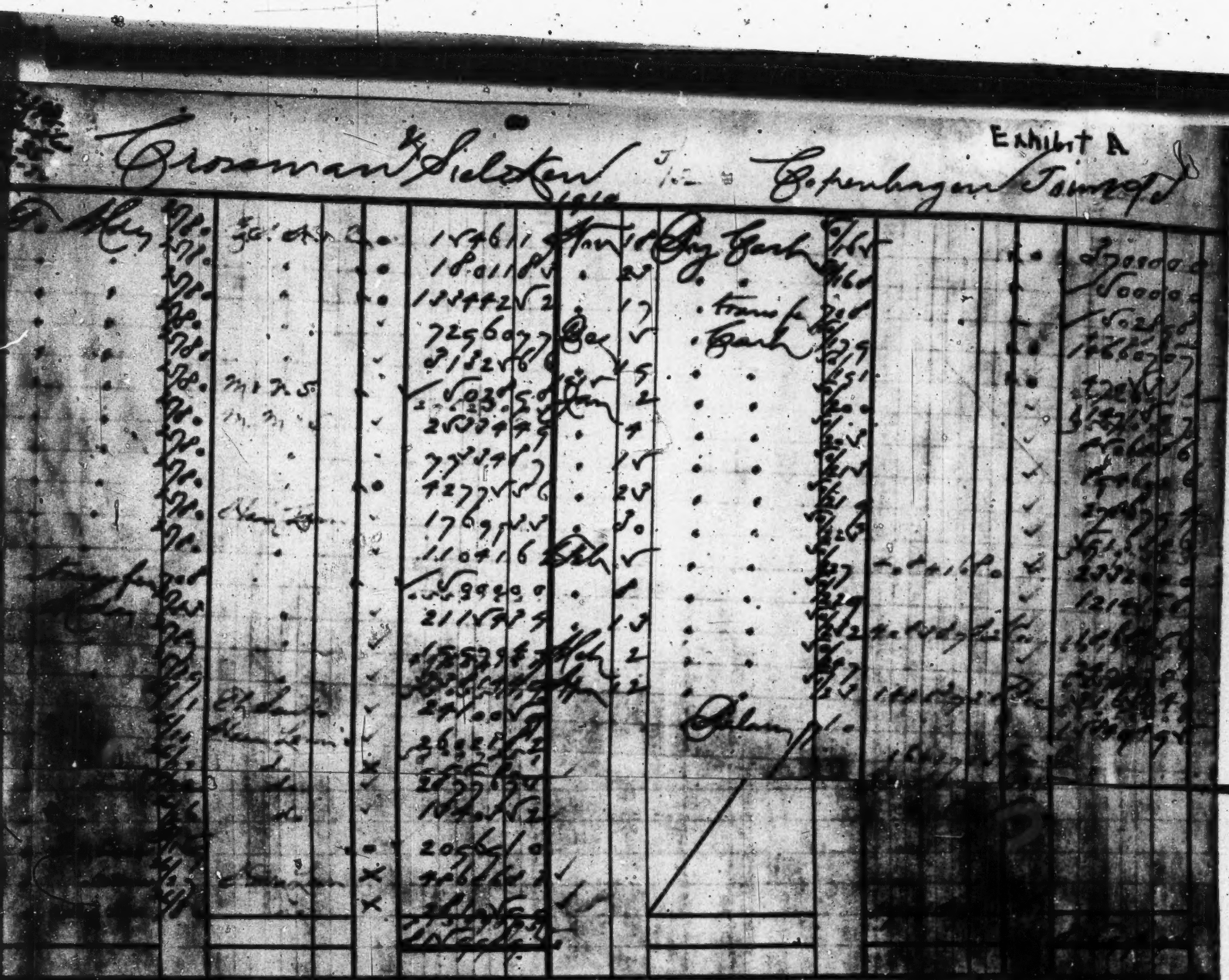
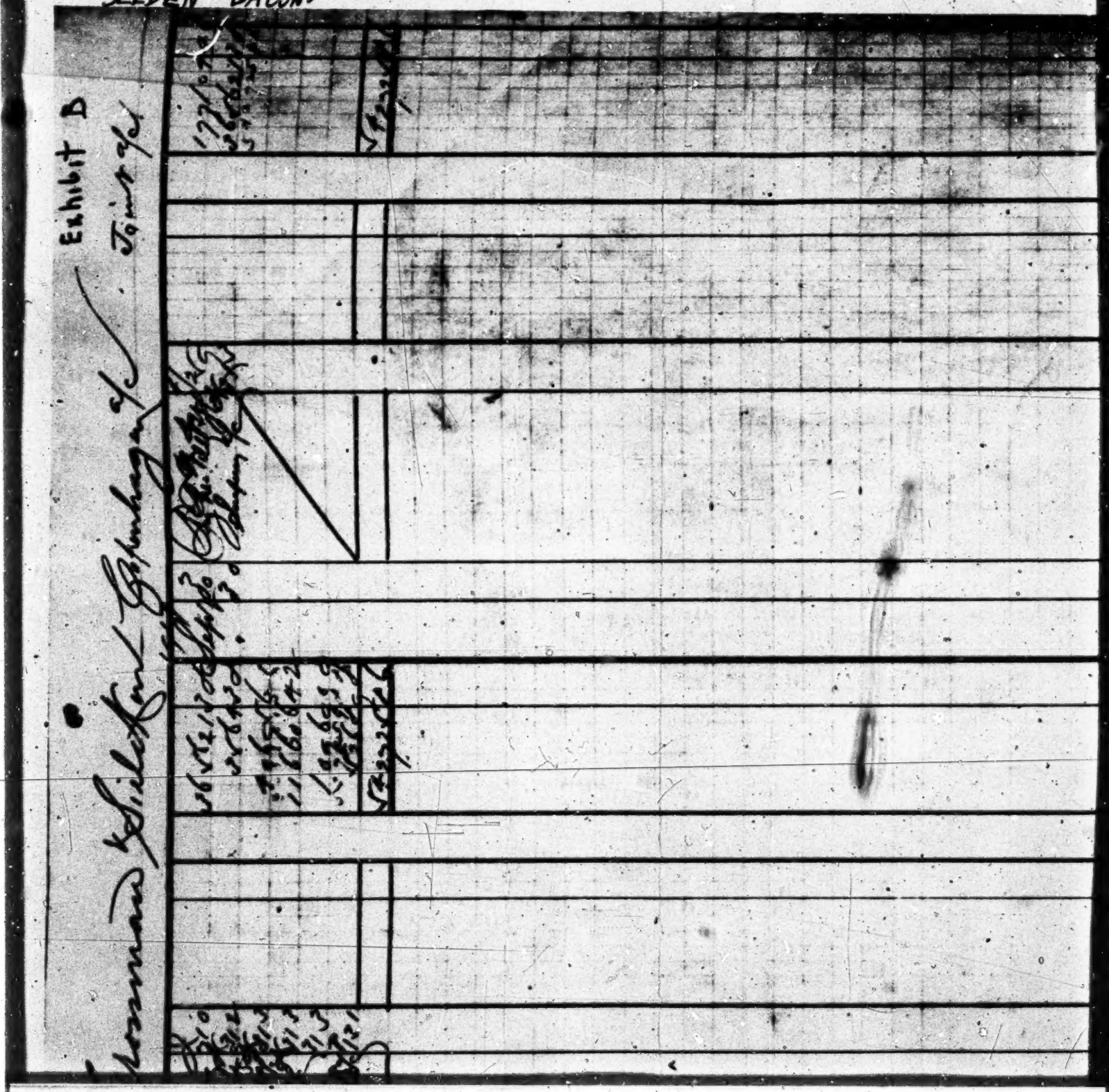
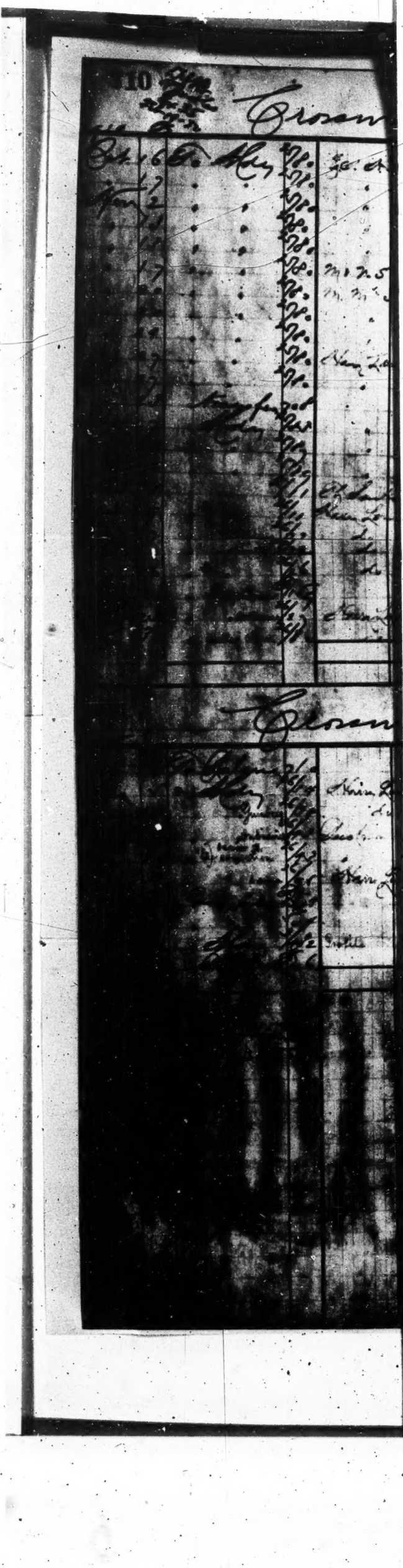


EXHIBIT A to AFFIDAVIT of SELDEN BACON.

EXHIBIT B TO AFFIDAVIT OF SELDEN BACON.





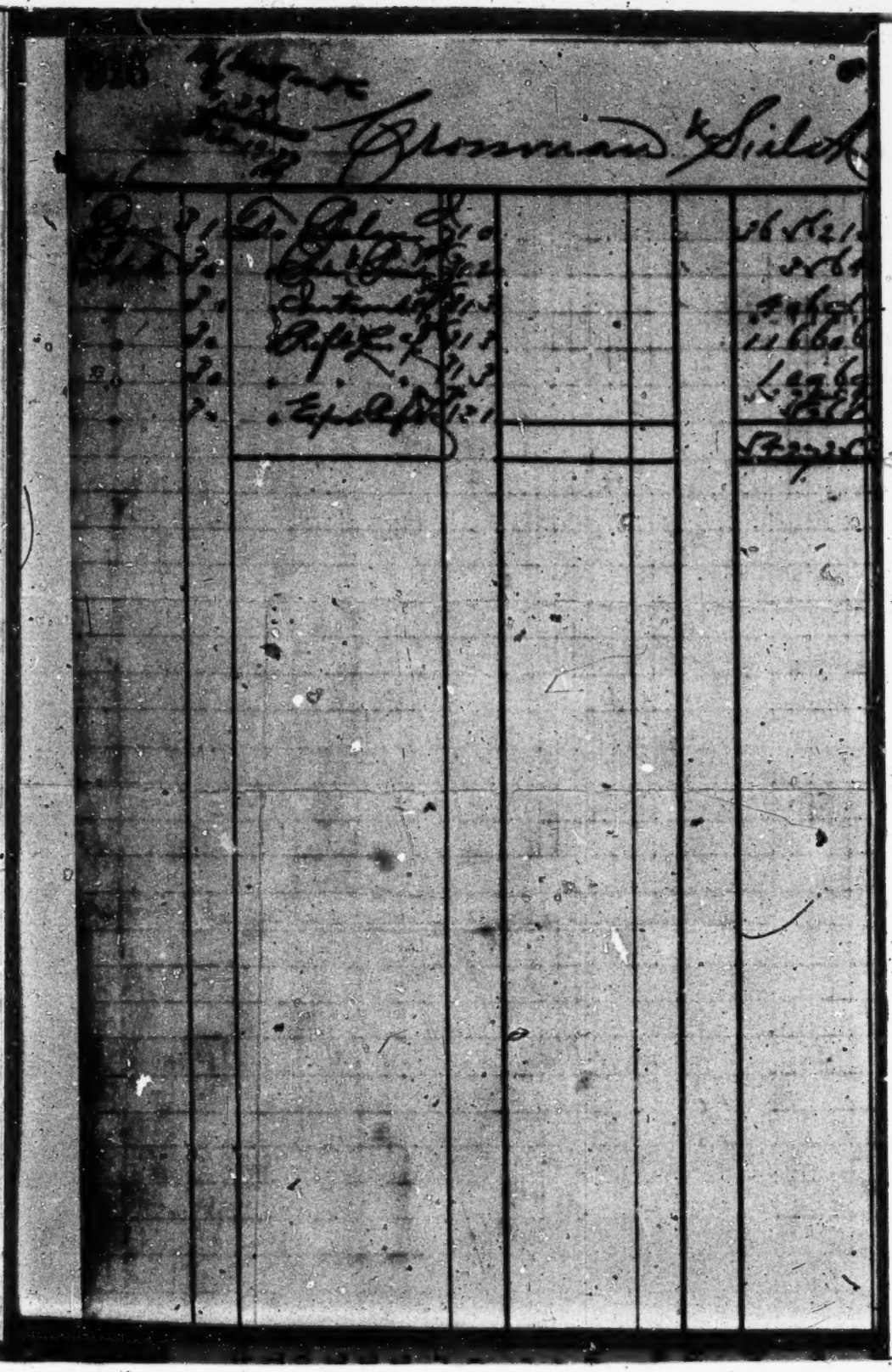


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Exhibit C.

3127

Extracts From Testimony of John S. Sorenson.

June 18, 1935.

Cross Examination by Mr. Bacon:

Q. I notice on this folio 710 of Brazilian Ledger J, both at the top of the page and on the second heading, the words, "Joint Account," and also in pencil, "J/A." A. Yes, sir.

Q. Were those part of the original entry on the ledger? A. No, sir.

3128

Q. Do you know when they were put on? A. Approximately about the early part of 1917.

Q. When that account was opened?

The Referee: Who put them on?

The Witness: The bookkeeper who wrote this. That is my writing (indicating).

Q. What is your writing? A. The two pencil marks is my writing.

Q. And the ink mark is— A. That is the accountant, the bookkeeper who kept this ledger.

Q. In the next volume of the ledger, do you find anything similar there on that account? A. Yes, sir, the same addition and the same writing.

3129

Q. Are there any pencillings there in your handwriting? A. No, sir.

The Referee: Who was that bookkeeper?

The Witness: The name is William J. Lucas.

Q. Is he still living? A. He was a year ago, because Mr. Avery—

The Referee: A year ago?

The Witness: Yes.

The Referee: You say these were put on in 1917, these two expressions of "Joint Account"?

The Witness: The early part of 1917, to my best recollection.

3130 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

The Referee: Did you see them at that time or shortly thereafter?

The Witness: Yes, sir.

By Mr. Bacon:

Q. Now, Mr. Sorenson, when did you first hear, and from whom, that Theodor Wille had any connection with this account of the Copenhagen cargo shipments? A. I learned definitely—

3131 The Referee: When did you first hear?

The Witness: In the latter part of 1914.

Q. What did you hear then? A. That he was interested, that is, in it; to what extent, I did not know; I wasn't told.

Q. From whom did you get that information? A. From Mr. Sielcken's letter.

Q. When did you get any further information with regard to that? A. When Nielsen returned in 1916, the latter part of 1916, he told me that Mr. Sielcken had advised him that Theodor Wille was one-half with us, and that he had conversations with Theodor Wille also.

3132 As we were working in the Prize Courts at the time, they agreed, Wille and he, that this participation should not be made—charged or credited on our books until the decision of the Prize Court had been received.

Q. When did you first make any charge to Wille of anything with regard to those Prize Court shipments? A. You mean the charge of the loss?

Q. Any charge to Wille. A. We did not do it; the Alien Property Custodian did it.

Mr. Spence: I object to that answer and ask that it be stricken out, as a pure conclusion.

The Referee: I think the answer should be stricken out.

The Referee: You say you never made any such entry?

The Witness: Crossman & Sielcken did not; no, sir.

Q. There is an entry on the books charging a half of that to Theodor Wille? A. Yes, sir.

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto 3133

Q. Who made those entries? A. Arthur Young & Company.

Mr. Spence: I object to the statement about Arthur Young & Company. That is a large accounting firm. That does not mean anything.

The Referee: Who in person wrote that in?

The Witness: There were four men there at the time; I don't know which one. Our clerks did it in the office, but they directed it. They had four men at the time. 3134

Q. Who was principally active there in giving directions on the part of Arthur Young & Company? A. Mr. MacKenzie was the man.

The Referee: McGuckin?

The Witness: No; he came later.

Q. Do you know what position he held in Arthur Young & Company? A. He had a partnership interest in it.

Q. Mr. McGuckin, concerning whom the Referee asked, what was his position? A. He was a junior who came along later. 3135

Q. Now, prior to the decision of the Prize Court in November of 1917, had you made any charge of a loss on those cargoes on the books? A. We had.

Q. How had you done it? A. At the end of 1915 we charged the entire amount to profit and loss account.

Q. Did you put that anywhere else on the books? A. Keeping it in suspense account in order to have the amount open on our books.

Q. When the charge was made to Wille of half—I think it was a charge of half the cost and half the interest, was it not? A. Yes, less profits on the cargoes that were not seized.

Q. When that was done, that was carried into 1917 profit and loss account? A. Yes, sir.

Q. And that charge to Wille was first made on the books at that time? A. Yes, sir.

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Q. You charged the entire interest for the whole period, not as part of that one time, did you not; that is the way it was done on the books? A. One-half we charged him.

Q. It was all done in one item as of that date; it was not scattered back through the 1915 and 1916 profit and loss accounts; it all went into the 1917 profit and loss account, did it not? You charged that profit and loss at the time shortly after the cargoes were seized. When did you first definitely know that there was a definite, 3137 fixed loss of those cargoes? A. That was a matter of gradual development, Mr. Bacon. As we went through the year 1915, after using every endeavor in Washington, in London and everywhere else, we were baffled by the difficulty of Mr. Sielcken's citizenship. We had been in California investigating—

The Referee: Who is "we"?

The Witness: Nielsen and I had made inquiries in California, if I remember correctly—

The Referee: You said you had been in California; you said, "We had been in California."

The Witness: No.

3138

Mr. Bacon: He said they had made inquiries.

The Referee: Read it, Mr. Stenographer.

(Record repeated.)

By Mr. Bacon:

Q. You mean you personally had been there? A. We had had a man in California to investigate the possibility of establishing Mr. Sielcken's citizenship there, and everything looked very hopeless at the end of 1915, and, rather than to make any distribution of profits to export managers on this very large amount, the only thing for us to do was to charge it to profit and loss, as Mr. Sielcken did not wish to pay any income tax, particularly on such items.

Mr. Spence: I object to that statement and ask that it be stricken out.

The Referee: Strike it out.

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto

3139

Mr. Bacon: I consent that it be stricken out. I understand what is stricken out is "Mr. Sielcken did not wish to pay any income tax, particularly on such items."

The Referee: Yes.

Q. And by charging it to profit and loss and then crediting it to suspense account, you avoided the carrying of that into the profits in which the export managers shared; is that right? A. Yes, sir; it would have been 40 per cent to them in case we had not done it.

3140

Q. That is, 40 per cent of the profits? A. Yes, sir.

Q. The decision of the Prize Court was the thing that finally definitely established it was a loss, was it not? A. Yes, sir.

(Pages 3839 to 3846.)

• • • • • •

Re-cross Examination by Mr. Bacon:

Q. What was the basis of those figures that you prepared for these journal entries? A. The amount on the accounts, after the Prize Court had thrown them out of court in London, these were prepared.

3141

Q. You mean this particular one, 534? A. Both of them, sir; after the Prize Court had decided against us.

Q. 533 and 534? A. Yes, sir.

(Page 4091.)

• • • • • •

Re-direct Examination by Mr. Spence:

Q. This particular paper, being Petitioner's Exhibit No. 534, was to charge Wille on the books of Crossman & Sielcken with some $345,415.09; is that correct? A. It was to charge them with $177,000.

Q. Half of the figure I mentioned, then, $177,104? A. After making a number of adjustments; yes, sir.

Q. And that entry was prepared about when, or that

draft? A. After the middle of November, when the cargoes were thrown out of court in London.

Q. Who told you of the Prize Court decision? A. Shearman & Sterling.

Q. Who in Shearman & Sterling? A. Mr. Forbes. We had it in writing, I know.

Q. How did you have it in writing? A. They sent us a letter.

Q. Who? A. Shearman & Sterling, and they enclosed a letter from Burn & Berridge of London, stating the
3143 facts.

Q. Where is that? A. The letter?

Q. Yes. A. I have copies of those home.

Q. Will you bring those down, please? A. Yes, sir.

Q. You have those letters, and you will bring them down? A. I have copies; yes, sir.

Mr. Spence: That is all.

Re-cross Examination by Mr. Bacon:

Q. Had the half share in the Copenhagen cargoes been previously charged up to Wille on the books? A. No, sir?

3144 Q. Why not? A. The prime reason was that it was a German account, and, with the condition of affairs in New York, we did not dare to put a German account as a participant in our business on our books, and it was agreed between Mr. Nielsen and Theodor Wille that so long as those things were in the London Prize Court, where we stated that we were the owners of it, that nothing would be put on the books against Theodore Wille.

Q. You say that was agreed between Nielsen and Wille? A. Yes, in 1916 when he was there, when he learned that they had a half share in it.

Q. All you know about that is what Mr. Nielsen reported to you? A. Yes, sir; and to Arthur Young & Company, who in turn had reported it to Washington.

(Pages 4091-4093.)

• • • • • •

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto 3145

Re-direct by Mr. Spence:

Q. I thought you said from 1916 on you decided that it was not well to enter anything on the books regarding Theodore Wille.

The Referee: He said with regard to Wille's interest.

Mr. Spence: That is what I mean.

A. This is the beginning of Wille's interest (indicating). There was nothing on Wille's account in this connection until this entry was made, sir. 3146

Q. So that anybody examining the books, no matter how detailed was the examination, could ever know anything about Wille's interest in those cargoes? A. That is right, sir.

Q. That was entirely dependent upon your private memoranda? A. Yes, sir. I had no private memorandum on that. There was nothing anywhere to show that Wille had a share.

The Referee: You knew it?
The Witness: I kept it quiet.
The Referee: Nielsen knew it? 3147
The Witness: Yes; nobody else in the office.
The Referee: And Mr. Sielcken knew it?
The Witness: Yes.

(Pages 4095-4096.)

3148 **Affidavit of George W. Alger, Verified September 7, 1938.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
3149 HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

Equity No. 44-28. Affidavit.

State of New York,
County of New York, ss:

3150 George W. Alger, being duly sworn, deposes and says that he is a member of the bar of the State of New York and of the bar of this Court, and has been such for over thirty-five years last past.

Deponent further says that he was retained as associate trial counsel in the trial of the above-entitled cause, and that he participated later in discussions with reference to negotiations for a settlement of all the claims of the firm of Crossman & Sielcken against Theodor Wille and Zentral Einkaufsgesellschaft in the early part of the year 1930, and in a threatened counterclaim of said Zentral Einkaufsgesellschaft.

The lawyers with whom I was associated in connection with the case included Mr. Earl B. Barnes, an attorney of this court (now deceased), his partner Mr. Brainard Avery, and in a minor degree with Messrs. Whiting and Castell of Mr. Avery's firm, and also with Hon. Charles D. Hamel, formerly a member of the United States Board

of Tax Appeals, and Mr. Richard S. Doyle, who was then Judge Hammel's partner.

The Alien Property Custodian and the United States Treasurer appeared in the action by Mr. Charles H. Tuttle, then United States District Attorney for the Southern District of New York, and Mr. Thomas E. Rhodes, an Assistant Attorney-General of the United States who conducted the trial of the case on their behalf.

The Zentral Einkaufs-Gesellschaft was represented in the suit by Mr. Arthur Garfield Hays and his partner, Mr. Abramson. Mr. Hays conducted the trial on behalf of 3152
this defendant.

I was informed from time to time by one or more of the attorneys above named with reference to communications which were made by my associates with Mr. H. H. Martin and with Mr. Robert W. Bonynge, the American agent for the Mixed Claims Commission United States and Germany, Mr. Martin being one of Mr. Bonynge's associates in the work of the Mixed Claims Commission.

To the best of my knowledge no claim had been made at any time prior to the actual trial of this case that either the firm of Theodor Wille or Zentral Einkaufs-Gesellschaft claimed or would claim to participate in the recovery in this action in any way. 3153

After judgment had been rendered in favor of the plaintiffs in this case, I was later informed, I think by Mr. Avery, that a claim was being asserted by Zentral Einkaufs-Gesellschaft. As I recall, the nature of that claim was substantially this: that the Zentral Einkaufs-Gesellschaft held an indemnity agreement from the German Executors of the late Hermann Sielcken undertaking to indemnify and hold harmless the Zentral Einkaufs-Gesellschaft from any recovery the firm of Crosman & Sielcken might make from them on account of the cargoes involved in this suit. I was advised by Mr. Avery and one or more of his associates, that this claim might readily have its serious aspects, and would involve a difficult question of German law. I was shown the opinion of a German lawyer, formerly a judge of the Commercial Court of that

3154 *Affidavit of George W. Alger, Verified September 7, 1938*

country, stating that in his opinion this so-called indemnity agreement was invalid under German law because it was executed on the part of the estate of Herman Sielcken by the German Executors of his estate, which Executors, it appeared, had personal interests involved in the matter adverse to those of the estate of Hermann Sielcken. Dr. Neumann, the German lawyer to whom I refer, had advised that in his opinion the contract was invalid under German law for that reason.

I do not recall when I first saw this opinion, but I am quite clear that it was a considerable period after the
3155 actual trial of the case. Whether or not the opinion of this German lawyer was sound would have to be determined in the courts of Germany if litigation arose. If decided adversely to the estate, there were ample assets of the estate in Germany, as I was advised, to satisfy this claim if found to be sound.

Mrs. Clara Sielcken Schwarz, the decedent's widow, was the sole residuary legatee of both the estate of her deceased husband in this country and of his estate in Germany.

I did not participate in the negotiations for the compromise of this claim with reference to this indemnity agree-
3156 ment. I was informed from time to time by Mr. Avery or some of the other lawyers associated with the matter, as to negotiations for its adjustment. It was, naturally, immaterial to the residuary legatee, if the claim with reference to this indemnity agreement were adjusted, whether whatever was paid in compromise of that indemnity agreement was paid out of the estate of the deceased in this country or whether out of his estate in Germany.

As far as I can now recall, the only defense to this indemnity agreement which I heard discussed was that stated above, the invalidity, for the reasons stated by Dr. Neumann, of the indemnity agreement itself.

My substantial connection in the matter was that of assisting Mr. Barnes in the preparation of the law and facts on the trial of the case itself. I was, however, present later on two occasions when there was a discus-

sion of negotiations for the adjustment of the indemnity matter and for adjustment with the firm of Theodor Wille and Germany.

I have read the memoranda of Mr. H. H. Martin covering two of these meetings, viz, January 9, 1930, and March 17, 1930, and giving in detail the substance of the discussion at the two meetings held at the office of the Mixed Claims Commission at which I was present together with Mr. Earl B. Barnes, Brainard Avery, Mr. Richard S. Doyle, and the American and German Agents before the Commission, and the counsel for each of them, and Mr. Abramson who was a partner 3158
of Mr. Arthur Garfield Hays who was attorney for the Zentral Einkaufs Gesellschaft, and which discussion related to the settlement of the claim presented by the Memorial against Wille and the claim advanced by Zentral Einkaufs Gesellschaft for indemnity against the German Executors of the Hermann Sielcken estate.

At these meetings both the American Agent and the German Agent and their respective counsel took the position that this claim for indemnity advanced by Zentral Einkaufs Gesellschaft was an independent matter entirely outside the scope of the jurisdiction of the Commission, and which the parties were entirely at 3159
liberty to settle for themselves if they saw fit irrespective of the claims advanced by the estate or the firm of Crossman & Sielcken against the Zentral Einkaufs Gesellschaft and Wille. I recall that Mr. H. H. Martin, counsel for the American Agent, stated at the first of these meetings, that it would seem to him that the claim for indemnity was and might be a serious matter which those interested in the estate of Hermann Sielcken were well justified in compromising, but that it was not a matter which concerned him and was something for them to determine if they chose.

I recall at this meeting of January 9, 1930, that a tentative settlement of the matters before the Commission was considered and in general approved by the parties concerned, except that Dr. von Lewinski, German

3160 *Affidavit of George W. Alger, Verified September 7, 1938*

Agent, said that before reaching any definite arrangement he would have to consult with the authorities in Berlin with regard to the settlement of the claim against Wille which it was then proposed to compromise on a basis of sixty per cent (60%) of certain particular items of the claim, viz, claim for depreciation of the German bonds supposed to have been held by Wille, or for a debt from Wille if Wille had not purchased the bonds but had "bucketed" the transaction.

I do not recall any further discussion of the matter of compromise until March 17, 1930, when I was again
3161 in Washington at a conference at the office of the Mixed Claims Commission with substantially the same persons present as at the prior meeting. I have no independent recollection of the date of this meeting except from the reading of Mr. Martin's memorandum as of that date, which I have read, and which refreshes my recollection, and which appears to be entirely accurate. At this meeting the German Agent, Dr. von Lewinski, advised us that the best offer he could make was fifty per cent instead of sixty per cent of the claim against Wille, mentioned above. This modification called for an award of $558,827.85, with interest at
3162 5% from April 1, 1918, on the Wille claim. After separate conference between counsel for the claimant this adjustment was approved, and the American Agent so advised on that date. I have no recollection of any personal participation by me in the discussion at these hearings. I was, however, present at them both, and Mr. Martin's memoranda seem to me complete as to the entire subject-matter discussed, as above stated. I have no recollection of having anything further to do personally with the settlement of the litigation.

To the best of my recollection there were no negotiations with reference to settlement until at least a week or ten days after the entry of judgment in favor of the plaintiffs in this case, and I have no recollection of any negotiations other than those outlined above.

Affidavit of George W. Alger, Verified September 7, 1938. 3163

At no time did I ever hear any suggestion that anything should be done in this matter without the full knowledge of the United States counsel interested in the various matters.

GEORGE W. ALGER.

Sworn to before me this
7th day of September, 1938.
Frederick H. Rohlfs,
Notary Public,
Kings County.
Kings Co. Clk. No. 7, Reg. No. 109. 3164
N. Y. Co. Clk. No. 56, Reg. No. O-R-45.
Commission expires March 30, 1940.

3165

3166 **Affidavit of Brainard Avery, Verified October 20, 1938.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against 3167 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H., Defendants. In Proceedings to Vacate Final Decree of December 30, 1929.	Equity No. 44-28. Affidavit.

State of New York,
County of New York, ss:

3168 Brainard Avery, being duly sworn, says:

I have read the letter from Mr. Martin of date September 21, 1938, copy of which is annexed to the supplementary affidavit of Mr. Sterck verified October 10th, 1938.

I notice that Mr. Martin, after carefully reading my long affidavit of August 11th, 1938, suggests but two slight differences between his recollection and mine after a lapse of eight years of the occurrences of January to March, 1930.

One of these is negligible. He agrees that he may have given me a message from Dr. von Lewinski that he (von Lewinski) would like to have a talk with me in regard to the settlement and that he (Martin) suggested that there was no objection whatsoever on the

part of the American Agency to my doing so; but he feels certain that he did not tell me at that time that it was "unusual for the German Agent to have personal conferences with counsel for claimants." And he adds that "Such procedure was not 'unusual,' particularly where such conferences was requested by the German Agent." Mr. Martin does not mention when any such other cases of conference arose, they may have been later than this one, and this the first instance of the kind. That he did make such remark to me was my recollection after eight years. He apparently thinks I am in error as to this detail though he makes no affidavit to that effect. He did not contradict the statement in his affidavit herein of September 14th, 1938. The point seems wholly immaterial in itself. 3170

The other point Mr. Martin criticizes is my statement that it was on March 17th, 1930, that I was present at a certain conference with Mr. Bonynge and Dr. von Lewinski. Mr. Martin does not dispute the fact that there was such a conference, or that what I have stated as occurring at that particular conference actually occurred. He merely questions the date.

As shown at page 44 of my affidavit verified herein August 11th, 1938, on Friday, March 14, 1930, at the request of Dr. von Lewinski, I sent the telegram to Mr. Bonynge shown on page 44 of that affidavit, reading as follows: 3171

"Hon. Robert W. Bonynge, American Agent
German Mixed Claims Commission,
Investment Building,
Washington, D. C.

"Doctor von Lewinski transmits through ZEG: New York lawyer Mister Hays requests for meeting Washington Monday morning March seventeenth stop Modifications of tentative settlement made January ninth are suggested which include settlement with Theodor Wille stop Mister Hays and myself will reach Washington Monday morning unless you wire to contrary.

BRAINARD AVERY."

I call particular attention to the specification of the *morning.*

The occasion of sending that telegram was that Dr. von Lewinski had that day stated to me at Mr. Hays' office the lines on which he believed he was authorized to conclude a compromise of all the various matters involved which were ultimately disposed of by the compromise; and I declined to take up that matter except concurrently with Mr. Bonynge and Mr. Martin, as I had been instructed by Mr. Bonynge to conclude
3173 nothing without his knowledge in advance. It was because of these instructions from Mr. Bonynge that the meeting was sought with him personally.

The same day, March 14th, 1930, I sent the following telegram to my associate Mr. Richard S. Doyle, who was then in New Hampshire:

"Richard S. Doyle,
c/o George Brown,
Tilton, N. H.

von Lewinski submits through Hays offer settlement entire matter including ZEG stop Offer appears feasible with some modifications stop von Lewinski wants meet
3174 with us Bonynge Monday morning Washington Hope you can surely be there.

BRAINARD AVERY."

The same day, March 14th, 1930, I sent the following telegram to my associate Mr. Alger, who was then in Atlantic City, New Jersey:

"George W. Alger,
Hotel Chalfonte,
Atlantic City, N. J.

Dear George vonLewinski submits through Hays offer settlement entire matter immediately including ZEG stop Offer appears feasible with some modifications stop vonLewinski wants meet with us Bonynge Monday morn-

ing Washington Can you go stop Suggest you meet me Congressional Limited North Philadelphia Sunday afternoon Wire or telephone Newyork Hope you are rested.

BRAINARD AVERY"

The same day I wrote to my associate Judge Hamel in Washington saying:

"Please arrange that we can surely have Mr. Bonynge and Mr. Martin available on Monday morning."

According to my recollection I heard from Judge Hamel by telephone the following morning that the appointment was confirmed, and I at once advised Dr. von Lewinski of the confirmation of that appointment through Mr. Hays' office. 3176

I accordingly went to Washington from New York and was there Monday morning, March 17th, 1930.

Mr. Barnes also came down from New York for that meeting, Mr. Alger from Atlantic City, Mr. Doyle from New Hampshire.

Dr. von Lewinski, Mr. Hays and Mr. Abramson were also there in Washington that morning pursuant to that appointment.

The presence of all these gentlemen in Washington that morning was not casual. 3177

After a brief conference between myself and my associates at Judge Hamel's office we went to Mr. Bonynge's own room in the suite of the American Agent, at 15th and K Streets, N. W., Washington, at about 10 or 10:30 a. m. and we there found, as I recall it, Mr. Bonynge and Mr. Martin also. I then told Mr. Bonynge what had occurred with Dr. von Lewinski at Mr. Hays' office on March 14th, 1930. After considering this he sent for Dr. von Lewinski, whose office was on a different floor of the same building. A few moments later and not later than about 11 a. m. Dr. von Lewinski came in with, I think, two of his German counsel, and also Mr. Hays and Mr. Abramson, the counsel for the Zentral Einkaufs-Gesellschaft. The ensuing conference

of that morning was held in Mr. Bonynge's personal room. What followed in the discussion at that morning session dealt primarily, if not exclusively with the adjustment of the indemnity claim of the Zentral Einkaufs-Gesellschaft and the demand of Wille for $100,000 to be contributed half by us and half by the Zentral Einkaufs-Gesellschaft.

These subjects Mr. Bonynge and Mr. Martin had both stated they did not consider business of the Mixed Claims Commission, but they had insisted on knowing beforehand all about any settlement of these claims and any
3179 negotiations therefor.

The fact that Mr. Martin's notes do not show anything about this conference on those subjects is perhaps explained by the fact that he had admittedly deliberately omitted from his minutes of the January 9th, 1930 conference the discussion that there occurred of the terms of the proposed settlement with the Zentral Einkaufs-Gesellschaft on the ground that he did not consider it a matter that officially concerned the Commission.

We discussed these matters there that morning for about two hours and then separated for lunch. At 2:30 the afternoon conference met in Mr. Martin's room.
3180 And, as I recall it, Mr. Bonynge did not attend that *afternoon* meeting.

It was at that conference on Monday morning that occurred the incidents that I detailed in my affidavit as occurring on that day, which are not shown in Mr. Martin's minutes of the more formal afternoon conference of that day.

Mr. Martin's notes are in error in the suggestion—although not positive statement—that Mr. Hays and Mr. Abramson, Mr. Doyle, Mr. Alger and I were in the City casually. On the contrary we were there to keep the definite appointment that had been made with Mr. Bonynge, the American Agent, with Dr. von Lewinski, the German Agent, and Mr. Hays for *Monday morning*, March 17th, 1930.

In preparing my original affidavit I had dealt with the entire proceedings of that day as one conference.

From Mr. Martin's point of view it would naturally be regarded as two conferences, one as to matters not within the jurisdiction of the Commission, and the other—the afternoon session—as a conference over matters in which the Commission was concerned.

At the afternoon conference, the matters were taken up on the basis that had been discussed in the morning. The figures were then carefully gone over and the terms of the stipulation for award and the ultimate figures of the Wille award were arrived at.

Mr. Martin's statement in his letter that Mr. Bonynge was not in Washington on March 17, 1930, seems, from the context of his letter, to be an inference drawn from his notes, which do not show the presence of Mr. Bonynge in the afternoon, and his report to Mr. Bonynge by letter the following day as to occurrences at the conference of Monday afternoon. 3182

These two data from which he draws the inference—he does not apparently attempt to speak from personal recollection after eight years—are entirely compatible with Mr. Bonynge's having been in Washington Monday morning. There is no incompatibility between the two facts.

Deponent's letter to Mr. Bonynge of March 10, 1930, and Mr. Bonynge's reply of March 11, 1930, which appear on page 42 of my original affidavit, and Mr. Martin's own letter to Mr. Bonynge of March 18, 1930, all show that both Mr. Martin and Mr. Bonynge, before the meeting of Monday afternoon, March 17, 1930, were entirely familiar with the details of the matter, not only of the compromise of the indemnity agreement held by the Zentral Einkaufs-Gesellschaft, but with the demand of Wille for $100,000, to be contributed half by us and half by the Zentral Einkaufs-Gesellschaft, and that the whole situation in all its details was fully known to them and approved by them, including both the payment to the Zentral Einkaufs-Gesellschaft and the payment to Wille. That is the essential fact to which I made affidavit, which Mr. Martin does not attempt to question. 3183

3184 *Affidavit of Brainard Avery, Verified October 20, 1938.*

I have also examined the affidavit herein of Mr. Sterck verified the 10th day of October, 1938, as to statements said to have been made to him or to Mr. McNamara by Mr. Rhodes.

I call attention to a few of the statements therein.

In the first place Mr. Rhodes is quoted as saying that he remembers my calling on him with Mr. Barnes "in the early part of 1928, and that at that conference Mr. Barnes did most of the talking, but that he does not recall the conversation. That call was in June, 1928, after my return from Germany, and the conversation
3185 was as stated by me in my affidavit herein of August 11th, 1938.

On page 2 of that affidavit of Mr. Sterck's he says that Mr. Rhodes said that it had been represented to him at all times after the receipt of the letter of December 7, 1928, from Mr. Doyle, of which a copy is annexed to the affidavit, that by reason of the *decision* of Judge Neumann there was no liability whatsoever on the part of the plaintiffs. Mr. Doyle's letter, which is annexed as an exhibit to that affidavit, is specific in its statement that the question was referred "for an *opinion*" to Dr. Neumann. A copy of the opinion of
3186 Dr. Neumann is attached to my former affidavit and it does not purport to be a decision but an opinion of counsel.

We never stated to Mr. Rhodes that there was no liability to the Zentral Einkaufs-Gesellschaft; and it was not claimed that there was any liability on the part of the plaintiffs. What was stated to Mr. Rhodes was that we contended that in accordance with the opinion of Judge Neumann the indemnity agreement was not valid; but we all recognized the very serious question presented by that document and the fact that any trial of that question would be conducted in a German Court by a plaintiff which represented the interests of the German Government.

Mr. Rhodes was informed in 1928 that the Zentral Einkaufs-Gesellschaft was asking that a very consider-

able sum of money be paid it in satisfaction of that claim, and he was told at that time that these advances on the part of the German authorities were rejected. Neither the Zentral Einkaufs-Gesellschaft nor the firm of Wille asserted any interest in the proceeds of the suit. No arrangement to pay them anything was ever made until months after the decree; and Mr. Rhodes certainly could not have raised any issue at the trial on that score.

It is very obvious from the letter of Mr. Doyle to Mr. Rhodes of December 7, 1928, of which a copy is annexed to Mr. Sterck's affidavit, that the conference of 3188
June, 1928, had nothing to do with the matter of stipulating unquestionable facts, for that letter opened with the statement that the letter is written in accordance with the suggestion made by Mr. Rhodes on November 28, 1928.

As to the statement in the last paragraph on page 5 that Mr. Rhodes stated that if it had been disclosed to him that Hermann Sielcken was an enemy within the meaning of the Trading With the Enemy Act and was the owner of all the capital assets of the firm, and that the said assets passed to the executor of Hermann Sielcken upon the death of said Sielcken, he would have 3189
raised the question of the jurisdiction of this Court at the trial. In point of fact the stenographer's minutes of that trial establish clearly that Mr. Rhodes asserted, with all the vigor at his command, that Sielcken was an enemy within the meaning of the Trading With the Enemy Act. Those minutes disclose also that the partnership articles, which provided that all the capital assets of the firm were the property of Sielcken and that the assets pass to the executor of Sielcken upon his death, were put in evidence at the trial, and those precise terms of the partnership articles were called to the attention of the Court at the trial. I was present throughout the trial. I annex extracts from those minutes, which could not have been called to the attention of Mr. Rhodes recently, or he certainly would not have made any such

3190 *Affidavit of Brainard Avery, Verified October 20, 1938*

statement. Those extracts are marked Exhibit A and are hereby made parts of this affidavit.

It would seem that either Mr. McNamara or Mr. Sterck misunderstood Mr. Rhodes or that Mr. Rhodes misunderstood them.

BRAINARD AVERY

Sworn to before me this
20th day of October, 1938.
William G. Phillips,
Notary Public.

3191 Nassau Co. N. Y. No. 1021.
Certificate filed in N. Y. Co. No. 108.
N. Y. County Register's No. 0-P-63.
My Commission Expires March 30, 1940.
(Notarial Seal.)

Exhibit A.

"Mr. Barnes: This suit, if your Honor please, is brought under Section 9 of the Trading with the Enemy Act.

3192 "The plaintiffs are the surviving liquidating partners of Crossman & Sielcken, a New York copartnership.

"There are two defendants, perhaps three defendants, the Alien Property Custodian, the Treasurer of the United States, those two being made defendants as required by the provisions of the Act, and then a German corporation by the name of Zentraleinkaufs-Gesellschaft, to which, for the sake of brevity, we have learned to refer as Z. E. G.

"The object of the suit is to secure payment to the plaintiffs from property of Z. E. G. which is held by the Custodian and the Treasurer of a debt which the plaintiffs claim was owing to them by Z. E. G. The amount claimed is $380,761 with interest.

"All of the defendants have appeared in the suit and have answered and are before your Honor.

"It is not the case with which you are most familiar, of a claimant endeavoring to get his own property back. We have had a great many of those claims. But this suit is brought under that provision of the Act which says that any person to whom a debt is owing may bring a suit to establish the debt. In other words, the Government has given practically an attachment remedy to American firms for the payment of their claims against enemies out of this fund.

"The claim here arises out of transactions that took place in the spring of 1915 when Germany and England were at war and of course several years before this country entered the war. The defendant Z. E. G. at that time was the purchasing agency of the Imperial German Government. 3194

"The Court: Were the transactions completed prior to the entry of this country into the war?

"Mr. Barnes: All of the transactions were completed in the spring of 1915, two years before this country entered the war.

"The claim arises by reason of the seizure by the British Government of six shipments of food which were purchased in this country by the plaintiffs and were shipped to neutral Baltic ports on neutral vessels consigned to persons in Copenhagen. 3195

"These vessels on the way over were intercepted by the British and they seized these particular food cargoes and took them to a British port and condemned them [illegible] the ground that they were contraband of war, [illegible]ey were destined for consumption in Germany. That is how this particular litigation has arisen.

"The plaintiffs' contention is that in purchasing and shipping these cargoes they were acting merely as purchasing agents of the defendant Z. E. G., that we consigned them to persons designated by Z. E. G. and that we were to be repaid by Z. E. G. our advances for the cost of the merchandise and our advances for the shipments and for the freight and for the insurance and a commission of 10%.

3196 *Affidavit of Brainard Avery, Verified October 20, 1938*

"That was the understanding between the parties, that we were acting over here to buy this stuff for Germany and to ship it under a 10% commission for our services and we were to advance the money.

"The amount involved represents the invoice value, the freight, the insurance and the 10% commission on these six seized cargoes.

"Of course what happened here took place fifteen years ago. The original arrangements were made in September of 1914. At that time Hermann Sielcken, the senior member of the plaintiffs' firm, Crossman & Sielcken, was in Germany. He had a summer place in Germany and it was his custom to go there every summer. At the time when this war suddenly broke out, as you recall, between the Allied Powers and the Central Powers, Mr. Sielcken and his family were in Germany."

3197

(Pp. 2-4.)

* * * * * * *

"Mr. Rhodes: Your Honor, may I say a word on that? The Trading with the Enemy Act defines an enemy as any individual, partnership or any body of individuals of any nationality resident within the enemy territory.

3198 "The Court: Exactly.

"Mr. Rhodes: The language does not say 'nationality' but it says 'resident within.'

"The Circuit Court of Appeals of this Circuit has held that 'resident within' means domiciled in the case of *Stadtmuller v. Miller.*

"The Court: I agree with that.

"Mr. Rhodes: And then it goes ahead and says in Section 3:

> "'* * * of any person in the United States except with the license of the President granted to such person, or to the enemy or allied enemy as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to or from, or for, or on account of or on behalf of, or for the benefit of any other person with knowledge or reasonable cause

to believe, that such other person or enemy or allied enemy is conducting or taking part in such trade, directly or indirectly, for, or on account of or on behalf of, or for the benefit of the enemy or allied enemy* * *"

is unlawful to do that, and it goes ahead and provides penalties to do that.

"If this partnership continued the conduct of the business by the American partner, residing in the United States, it would be in part for the benefit of the home partner, Sielcken, whom this evidence here shows was 3200
domiciled in Germany.

"He had his estate over there; he lived there. His office was there, and his business was there. That was his home and domicile. That would be in clear violation of the Act for the American partner to continue to carry on the business for him; so it must obviously follow that the partnership was dissolved upon the declaring of war because nowhere in the Act is there based upon citizenship any standard, but it is based upon domicile."

(Pp. 73-74.)

* * * * * *

"Mr. Rhodes: But, your Honor, the purpose of Con- 3201
gress was to place all persons resident in Germany, because Congress realized that some of the most dangerous enemies we had were American citizens that came over here and made their money and went back to Germany."

(P. 76.)

3202 **Affidavit of Selden Bacon, Verified October 18, 1938.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property 3203 Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

Equity No. 44-28
Affidavit.

State of New York,
County of New York, ss:

3204 Selden Bacon, being first duly sworn, deposes and says:

That deponent, on July 26, 1938, being desirous of checking in every way the correctness of the statements later embodied by Mr. Brainard Avery in his affidavit of August 11, 1938, in this proceeding, saw Mr. Thomas E. Rhodes of Washington, who tried this case in 1929 for the United States Treasurer and the Alien Property Custodian as counsel for them.

That Mr. Rhodes stated to deponent that he had seen a copy of the indemnity agreement executed by the German Executors of Sielcken to the Zentral Einkaufs-Gesellschaft, and had known about it prior to the trial of the suit.

Mr. Rhodes also stated that he desired to make no affidavit in the matter; that he had been approached

 3205

by the Department of Justice with the request that he make an affidavit and had declined to do so unless he first had full opportunity to examine his own files and memoranda of 1927 to 1929, so as to be sure he made no mistake.

Mr. Rhodes also told deponent that he was satisfied he had been treated by all the counsel for the plaintiffs in this suit with openness and he told deponent that Mr. Abramson, Mr. Hays' partner, had been in to see him in the spring of 1930, and had told him that they were making a settlement and not going to take an appeal. This statement by Mr. Rhodes to deponent was 3206
the first information deponent had of any conversation on that subject between Mr. Rhodes and Mr. Abramson. On the strength of it, deponent inquired of Mr. Abramson, who made the brief affidavit, dated August 5, 1938, included in the answering affidavits put in on behalf of the Irving Trust Company.

Deponent further says that he has recently been furnished by Mr. Martin with an extract from his letter to Mr. Bonynge of March 18, 1930. The information given deponent on that subject by Mr. Martin reads as follows:

"I furnished Mr. Bonynge on March 18, 1930, with 3207
a copy of my memorandum of March 17th. In my letter to Mr. Bonynge I had the following to say with reference to the conference:

"'After a rather extended conference on the subject it was finally decided by claimants, concurred in by me, to accept the revised offer. The claimants were influenced to a certain extent in arriving at this decision by the fact that they are to receive from the firm of Theodor Wille, a general release of all claims that that firm may have against Crossman & Sielcken. This release claimants were assured, by Mr. Hayes, concurred in by the German Agent, would be forthcoming.

3208 *Affidavit of Selden Bacon, Verified October 18, 1938*

"'I explained to the parties that the questions of claims that the firm of Theodor Wille might possibly have against Crossman & Sielcken was of no more concern to the Agency than is the question of the possible claims arising out of the so-called indemnity agreement involved in the Z. E. G. claim, and that the Agency was not directly concerned with either of these matters.'"

SELDEN BACON.

3209 Subscribed and sworn to before me this
18th day of October, 1938.
James S. Ogsbury, Jr.,
Notary Public.
Nassau Co., N. Y. No. 1870.
Certificate filed in N. Y. Co., No. 180.
N. Y. County Register's No. 0-O-105.
My Commission expires March 30, 1940.
(Seal).

3210

Warrant for Satisfaction of Decree of December 30, 1929. 3211

IN THE UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

against

HOWARD SUTHERLAND as Alien Property Custodian, WALTER O. WOODS as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

Equity No. E 44-28 3212

To the Clerk of the United States District Court for the Southern District of New York:

Whereas, the plaintiffs, John S. Sorenson and Thorlief S. B. Nielsen, as the surviving partners of Crossman & Sielcken, did on the 30th day of December. 1929, obtain a decree in the United States District Court for the 3213
Southern District of New York against the defendants, which was filed in said court on January 2, 1930, and which directed the defendants, Howard Sutherland, as Alien Property Custodian, and Walter O. Woods, as Treasurer of the United States, to forthwith convey and deliver to said plaintiffs the sum of $716,160.37 (Seven Hundred and Sixteen Thousand, One Hundred and Sixty and 37/100 Dollars), together with interest thereon at the rate of 6 per cent from the date of said decree to the date of the payment thereof to the plaintiffs, which sum constituted final satisfaction of said decree.

And Whereas, the plaintiffs, John S. Sorenson and Thorlief S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, have received from Howard Sutherland, as Alien Property Custodian, and Walter O. Woods, as Treasurer of the United States, the sum

3214 *Warrant for Satisfaction of Decree of December 30, 1929*

of $716,160.37 (Seven Hundred and Sixteen Thousand, One Hundred and Sixty and 37/100 Dollars), together with interest thereon in the sum of $11,458.56 (Eleven Thousand, Four Hundred and Fifty-eight and 56/100 Dollars) in final satisfaction of said decree entered in in this case;

These Are, Therefore, to desire and authorize you to enter an acknowledgment of the final and complete satisfaction upon the record of said decree and for your so doing, this shall be your sufficient warrant and discharge in that behalf.

3215 In Witness Whereof, we, as solicitors of record of the said plaintiffs, John S. Sorenson and Thorlief S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, have hereunto set our hands and affixed our seal this the 10th day of April, 1930.

EARL B. BARNES,
BRAINARD AVERY.

City, County and State of New York, ss:

Be it remembered on this 10th day of April, 1930, before me, the subscriber, a Notary Public of the County
3216 of New York, State of New York, personally appeared Earl B. Barnes and Brainard Avery, who I am satisfied are the persons named in and executing the foregoing indenture and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein set forth.

EMILIE B. BENDER,
Notary Public.

Kings Co. No. 262.
N. Y. County No. 680.
N. Y. Register's No. 2B 476.
My commission expires March 30, 1932.

Notice of Appearance. 3217

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H., 3218

Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

Please take notice that the undersigned appears as attorney of record for Homer S. Cummings, as Attorney-General of the United States, in behalf of the United States and as successor to the Alien Property Custodian. The undersigned was admitted to practice before the bar 3219
of this Court for the purposes of this case upon motion by David W. Wainhouse, Esq., in open Court on Tuesday, October 11th, 1938.

FRANCIS J. McNAMARA,
Special Assistant to the Attorney-General of the United States of America.
Attorney for Homer S. Cummings, Attorney-General of the U. S. on behalf of the United States and as Successor to the Alien Property Custodian.

United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

3220 **Opinion of Goddard, J.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

against

3221 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

E 44-28

Leonard B. Smith and Selden Bacon,
Solicitors for Irving Trust Company, as Executor of Hermann Sielcken, deceased, by Nathan L. Miller, Selden Bacon, of Counsel.
Sam E. Whitaker, Assistant Attorney-General.
3222 Lamar Hardy, United States Attorney.
Francis J. McNamara, Special Assistant to the Attorney-General.
Harry LeRoy Jones,
Frank C. Sterck,
James A. Shipper,
Attorneys, Department of Justice.
David W. Wainhouse, Assistant United States Attorney, of Counsel.

Goddard, District Judge:

This is a motion by the Attorney-General of the United States to vacate the final decree entered herein on the 30th day of December, 1929, for the plaintiffs on the ground that the court was without jurisdiction of the suit because it was not a suit cognizable under

the provisions of the Trading with the Enemy Act, and was not otherwise properly within the jurisdiction of this court.

The suit was against Howard Sutherland, then Alien Property Custodian, and Frank White, then Treasurer of the United States, in their official capacities. The Zentral Einkaufs-Gesellschaft M. B. H. (hereinafter referred to Z.E.G.), a corporation of Berlin, Germany, doing business as an official purchasing agency of the German Government, was also named as a defendant, although no relief was prayed for against it or awarded 3224
by the decree; and it appeared and filed an answer and unsuccessfully contested the debt. The suit was brought by the plaintiffs, Sorenson and Nielsen, as the surviving partners of the firm of Crossman & Sielcken, a New York partnership, in 1927, in purported pursuance of section 9(a) of the Trading with the Enemy Act (c. 106, 40 Stat. 411) as amended. The entire capital of that firm was owned by Hermann Sielcken who, up to the time of his death on October 8, 1917, had continuously resided in Germany since March, 1914. The suit sought to establish a debt owing to the firm of Crossman & Sielcken from Z.E.G. which was based upon the value of certain cargoes shipped by Crossman & Sielcken from 3225
New York to neutral consignees but destined for delivery to Z.E.G. under an agreement made between officials of the German Imperial Government, the firm of Theodor Wille of Hamburg, Germany, and Hermann Sielcken, while he was a resident of Germany, and the suit sought to have applied to the payment of the debt the sum, amounting with interest, to some $715,000, which had been seized as enemy property by the Alien Property Custodian under the Act and held by him and the Treasurer of the United States under a Trust No. 592 in the name of Z.E.G.

The suit which resulted in the decree for the plaintiffs for the sum of $716,160.37 on December 30, 1929 was tried in this court. No appeal was taken and the decree was satisfied by the Alien Property Custodian and the

3226 *Opinion of Goddard, J.*

Treasurer of the United States. A warrant for satisfaction in the amount of $727,613.93 was executed on April 10, 1930.

On May 1, 1934, pursuant to an Executive Order 6694, the office of Alien Property Custodian was abolished and the authority, rights, powers and duties conferred upon the Alien Property Custodian by law and executive order, were transferred to the Department of Justice to be administered under the supervision of the Attorney-General.

3227 Service of motion papers to vacate the decree was made on John S. Sorenson, one of the original plaintiffs herein, and upon the Chase National Bank of the City of New York as Ancillary Executor of the Estate of Thorleif S. B. Nielsen, deceased; but on June 10, 1938, after a hearing before a judge of this court on an order to show cause why an order should not be entered vacating the service on the said Bank as Ancillary Executor on the ground that it was discharged as such Ancillary Executor in 1934, the Attorney-General and the Bank agreed to a discontinuance of the proceedings as to the Chase National Bank, as Ancillary executor of the Estate of Thorleif S. B. Nielsen, deceased, and on 3228 June 15, 1938, an order was entered to that effect. Thorleif S. B. Nielsen died in September, 1930, and thereupon John S. Sorenson became the sole surviving member of the former firm of Crossman & Sielcken.

Out of the recovery in said suit, it appears that one-half was directly or indirectly paid to Z.E.G. and $100,000 to the firm of Theodor Wille.

The Government in this proceeding is not questioning the decision of the court on the merits, namely—whether a debt was or was not owing by Z.E.G. to the firm of Crossman & Sielcken. The original suit was a proceeding in rem and the Z.E.G. was not a necessary party. Koscinski v. White—286 Fed. 211, and the joinder, non-joinder, or the dissolution of Z.E.G., an enemy debtor, does not affect the jurisdiction herein. Spiegleberg v. Garvan—260 Fed. 302.

Counsel for plaintiffs contend that there was no seizure of the property of Hermann Sielcken and could not for the reason that Sielcken died on October 8, 1917 and that the Alien Property Custodian was not appointed until October 22, 1917, and that moreover, the Custodian never made any demand for Sielcken's property or his estate. Insofar as this first contention is concerned, it is firmly established law that the Alien Property Custodian might seize enemy property found within this country, even though the former owner was deceased. Miller v. Schutte—267 Fed. 604 (appeal dismissed 263 U. S. 730). 3230

The affidavits with appended documents amply support the conclusion that not only all the right, title and interest of Hermann Sielcken in the liquidation of the partnership of Crossman & Sielcken, but all the right, title and interest of the German executors and of the beneficiaries under the will of Hermann Sielcken, deceased, were seized by the Alien Property Custodian. In support of this conclusion, without discussing the details at length, it is sufficient to refer to the admissions and records of the respondent, Irving Trust Co., the successor of the Columbia Trust Co., including Sterck's affidavits, claim of George E. Warren, Vice- 3231 President of Columbia Trust Co., sworn to March 28, 1921; the sworn amendment of March 29, 1921 to claim, the receipt of April 5, 1921, signed by Warren acknowledging that the Trust Company has filed with the Alien Property Custodian * * * notice of claim against the money and property in the hands of said Custodian or the Treasurer of the United States taken as property of Herman Sielcken and/or estate of Herman Sielcken determined by said Custodian to be an enemy * * *"; also the opinion of Mr. Surrogate Foley in In Re Sielcken Estate—3 N. Y. S. 793 (2nd). The Columbia Trust Co., the corporate predecessor of the respondent, Irving Trust Co., assisted in carrying the seizure into effect under its accepted appointment as

3232 *Opinion of Goddard, J.*

agent for the Alien Property Custodian and its designation as depository for the Alien Property Custodian.

Upon seizure of the enemy alien property by the United States under the Trading with the Enemy Act, the enemy owners were divested of every right, title and interest therein. United States v. Chemical Foundation —272 U. S. 1, and it became the property of the United States. A suit for the recovery of it is a suit against the United States which may only be brought upon the consent of the United States to be sued. Henkles v.
3233 Sutherland—271 U. S. 298. Section 7(c) of the Act authorized the seizure of all money or other property held for or by enemies or allies of enemies and provided as follows:

"* * * and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act."

Section 9 of the Act is the only statutory authority for suits to recover such property, and the pertinent part of it provides:

"Sec. 9(a). That any person not an enemy or ally of
3234 enemy * * * to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; * * * if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as

the case may be, shall be made a party defendant), to establish the interest, right, title or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *"

A plaintiff whose property was thus seized could not invoke the general equity jurisdiction of the court. His remedy is that provided in Section 9, which is ex- 3236
clusive. Crone v. Sutherland—63 Fed. (2nd) 895 (Court of Appeals, District of Columbia; Sutherland v. Norris—24 Fed. (2nd) 414 (C. C. A. 3).

After the termination of the state of war (July 2, 1921) the Congress made available certain remedies to a restricted class enabling them to proceed for the return of their seized property. Section 9 of the Act was amended in 1923 (Act of March 4, 1923, 42 Stat. 1511) and in 1928 (Act of March 10, 1928, 45 Stat. 254) the procedural remedies extended to enemies under section 9 were always limited by the Congress to those persons who were "the owner" of the property "at the time such 3237
money or other property" was seized by the Alien Property Custodian. Although section 9 was amended so as to allow the bringing of suits by various classes of enemy claimants, the remedy provided for those seeking to establish a debt as in the case at bar, has at all times since the Act remained expressly limited "to any person not an enemy alien or ally of an alien." Section 9 granting consent to sue excludes as a debt claimant any one defined in section 2 of the Act as an "enemy" and this section 2(a) reads as follows:

"Any individual, partnership, or other body of individuals, or any nationality, resident within the territory * * * of any nation with which the United States is at war * * *."

3238 *Opinion of Goddard, J.*

Hermann Sielcken, the principal partner and owner of the entire capital of the firm of Crossman & Sielcken. was included within the term "enemy." The allegation in the bill of complaint—and the only one respecting the non-enemy status of the plaintiffs, is

"SECOND: Said partnership of Crossman & Sielcken at all times has had its principal place of business in the Borough of Manhattan, City, State and Southern District of New York, and has been and is a resident of said Borough of Manhattan, City and State of New
3239 York, and has not at any time been a resident within territory (including that occupied by the military and naval forces) of any nation with which the United States was at war and was not, nor at any time has it been, an enemy or ally of enemy within the meaning and purview of those terms as used and defined in the Act of October 6, 1917, known as and herein referred to as the Trading with the Enemy Act, or in any act amendatory thereof and supplemental thereto or in any proclamation or executive order issued by the President of the United States pursuant to subsection (c) of section 2 of the Trading with the Enemy Act."

3240 It is true that for some purposes a partnership is treated as an "entity"; but a partnership is not a juristic entity. Rossmore v. Commissioner—76 Fed. (2nd) 520 (C. C. A. 2) and it is fully established that, when citizenship is a necessary jurisdictional allegation in a suit by or against a partnership, this court must consider the diverse citizenship of the several persons composing the partnership or association. Great Southern Hotel v. Jones—177 U. S. 449. The rule applies to the Trading with the Enemy Act in which non-enemy status of the individual partner is a jurisdictional condition precedent to the filing of a debt claim and the institution of a suit upon such claim. Froelich & Kuttner v. Sutherland—22 Fed. (2nd) 870 (Court of Appeals, District of Columbia); Waldes v. Basch—179 N. Y. S. 713.

Accordingly it is clear that under section 9 of the Act, it is the residence of the partners who composed the firm of Crossman & Sielcken which determines whether jurisdiction was conferred upon this court. The fact that the partnership was organized and that it carried on its business in the United States is, of course, immaterial, for if these, and not the residence of the partners, were the controlling factors the purpose of the Act would be readily evaded. The general rule is that it is essential that the right of the plaintiff to institute an action and the jurisdiction of the court shall 3242
appear on the face of the bill by positive averment, applies to suits under section 9 of the Trading with the Enemy Act. Garvin v. Kogler—272 Fed. 442 (C. C. A. 3).

Section 7 (c) of the Trading with the Enemy Act provides that—

"The sole relief and remedy of any person having any claim to any money or other property * * * conveyed * * * to the Alien Property Custodian * * * shall be that provided by the terms of this act * * *."

For a plaintiff to be entitled to the relief and remedy under section 9, it must appear that the debt claimant 3243
be "not an enemy" and that a debt is owing to such claimant from an enemy whose property has been seized; also section 9(e) that the debt was owing to and owned by the claimant prior to October 6, 1917. The co-partnership agreement of the partnership of Crossman & Sielcken provides—

"FIFTH: The capital of the partnership shall consist of all the property and assets of every kind and description belonging to the said Hermann Sielcken, as surviving partner of the late firm of Crossman & Sielcken, or such part thereof as may be used in the business of the partnership now formed, including the goodwill of said firm. The whole of the said capital shall continue to be the property of the said party of the first part, and upon the termination of the partnership

3244 *Opinion of Goddard, J.*

from whatever cause, the same shall belong entirely and absolutely, to the party of the first part or to his estate. The parties of the second and third parts shall have no share or title in or to any of the said capital, their only interest in the business consisting of their shares of the net profits that may be realized therefrom."

Upon the declaration of war on April 6, 1917 the partnership of Crossman & Sielcken was dissolved by operation of law. Sutherland v. Mayer—271 U. S. 284. Hermann Sielcken, the owner of the entire capital of the firm
3245 of Crossman & Sielcken, was and had been for several years prior to his death on October 8, 1917, an enemy alien under section 2(a) of the Act.

Another article of the co-partnership provided:

"ELEVENTH: Upon the death of the party of the first part, it shall be the duty of the surviving partners to transfer and pay over to the executor of the will of the deceased partner his capital as above defined and also all the property and business of the firm."

Accordingly, prior to October 8, 1917, when Hermann Sielcken died, Sorenson and Nielsen owned but "an interest in the business consisting of their shares of the
3246 net profits that may be realized therefrom" and that all the capital, property and business, including as an asset the debt sued upon belonged "entirely and absolutely" to Hermann Sielcken during his lifetime and to his estate upon his death.

The plaintiffs brought the suit allegedly under Section 61 of the Partnership Law of New York, which provides that a partnership is not terminated by dissolution, but continues until its affairs are wound up. But Section 68 of the Partnership Law states that the surviving partners have the right to wind up the affairs of the partnership *only* if it be *not* "otherwise agreed." In this co-partnership agreement it was "otherwise agreed"; and under the express terms of Hermann Sielcken's will, the sole right to liquidate the partnership assets and the property of the firm of Crossman & Sielcken was

after his death vested in the executor appointed in his will.

A judgment entered in the Supreme Court for the County of New York on November 11, 1933, upon the Referee's Report submitted in the case of Chase National Bank of the City of New York, as Ancillary Executor of the Last Will and Testament of T. S. B. Nielsen v. John S. Sorenson, Irving Trust Co., as Executor of the Last Will and Testament of Hermann Sielcken, deceased, *et al.*, read:

"Now, on motion of Avery & Whiting, attorneys for 3248
the said defendant, Clara Sielcken-Schwarz, it is

ADJUDGED that upon the death of said Hermann Sielcken on October 8, 1917, by virtue of the terms of a certain partnership agreement dated June 2nd, 1913 (a copy of which is attached to the complaint herein) between said Sielcken and said John S. Sorenson and said Thorleif S. B. Neilsen and by virtue of the terms of said Sielcken's will dated March 23rd, 1914, and admitted to probate by the Surrogates' Court of the County of New York on the 26th day of January, 1918, the sole right to liquidate the partnership assets and property of the firm of Crossman & Sielcken was vested in the 3249
executor named in said will, now said defendant Irving Trust Company, and under the terms of said instruments no other person was lawfully entitled to be such liquidator. It is further

ADJUDGED that neither the plaintiff's testator, Thorleif S. B. Nielsen nor said defendant John S. Sorenson, is now or at any time since the dissolution of said firm of Crossman & Sielcken by the said death of said Hermann Sielcken on October 8th, 1917, has been a liquidating partner thereof."

On November 8, 1937, the Supreme Court of New York County entered a final judgment in said case.

Respondent contends that "even if the articles (copartnership agreement) were to be construed as transferring the partnership receivables to the executor so

that it alone could properly maintain suit on claims due the partnership in the absence of further agreement, there was in this case, just such an agreement made between the executor and Sorenson and Nielsen. Such an agreement was made by the letter from the executor of June 14, 1918, to the two surviving partners and their acceptance of it, and action under it." However, not only is it apparent from this letter that it was recognized by the surviving partners and Sielcken's executor that the co-partnership agreement vested Sielcken's executor the sole right to bring suit on claims due the
3251 partnership, but moreover, the purported transfer and assignment of that right for the purposes of this suit was void under the Trading with the Enemy Act, Sections 7(b) and 9(b); Schrijver v. Sutherland, 19 Fed. (2nd) 688 (Court of Appeals, District of Columbia).

It further appears that whatever interest the plaintiffs were entitled to in accordance with the co-partnership agreement was paid to them out of the surplus funds of the partnership, as is evidenced by the settlement entered into by the firm of Crossman & Sielcken in liquidation with each of the plaintiffs on December 23, 1917, and the releases executed by both plaintiffs releasing the firm of Crossman & Sielcken, its successors
3252 and assigns, and the members thereof, their heirs and executors from all claims and causes of action. This release included any interest in the debt which the plaintiffs sued upon, for it stated:

"In consideration of the receipt of the aforementioned payment, I hereby agree that, should any amount be awarded to me, individually, by any Prize Court or otherwise, on account of goods shipped during the year 1915 and seized by the British Naval Authorities, I will pay all such amounts forthwith to the Columbia Trust Co., as Executors of the Estate of Hermann Sielcken, deceased."

Therefore, it is clear that the plaintiffs neither prior nor subsequent to the death of Hermann Sielcken, were

the owners of the debt claimed within the terms of the Act, and had no standing to invoke the jurisdiction of this court in this suit brought by them, either as individuals or as the alleged surviving partners of the firm of Crossman & Sielcken.

In my judgment the allegation in the bill, paragraph "Second" as to non-enemy status did not state facts sufficient to confer jurisdiction on this court.

In September, 1917, Sorenson and Nielsen proceeded to liquidate the partnership pursuant to the requirements of the United States War Trade Board. On November 16, 1917, the War Trade Board required them 3254
to turn over to the Alien Property Custodian the share of the enemy partner, Hermann Sielcken, in the proceeds of the firm. All the assets of the firm of Crossman & Sielcken were turned over to the Columbia Trust Co. as agent for the Alien Property Custodian by Sorenson and Nielsen. Thereupon, the Alien Property Custodian acquired all of the assets of the firm of Crossman & Sielcken, including this and all other choses in action and the plaintiffs were divested of every right, if they had any, in respect to the property so taken and held under the Act. Woodson v. Deutsche, etc., 292 U. S. 449. While the plaintiffs could not base any claim to 3255
the property so seized upon a retained right of ownership in or control over a chose in action or the property seized, they might have filed a claim solely upon a right arising out of the terms of the Act itself if the right existed, for the return to them of this or any other asset seized by the Alien Property Custodian as belonging to the firm of Crossman & Sielcken, or to the estate of Hermann Sielcken. They filed no such claim nor was the asset in question ever returned to them by the Alien Property Custodian.

The Government contends that even if it be assumed that the allegation in the bill to the effect that the partnership was not an enemy, without alleging the non-enemy status of the partners, was sufficient to confer jurisdiction, which it denies, the suit was collusively brought in the names of the plaintiffs for the purpose of

3256 *Opinion of Goddard, J.*

creating a suit cognizable under the Act and that such suit is not within the jurisdiction of this court.

The Attorney-General on April 4, 1921, allowed a claim filed by the Columbia Trust Co., as Executor of the Estate of Hermann Sielcken, deceased, and ordered the release to the Executor in purported pursuance of Section 9 of the Act of all right and interest of the Alien Property Custodian in the interest of Hermann Sielcken in the liquidation of the partnership of Crossman & Sielcken and in the Estate of Crossman & Sielcken and in the Estate of Hermann Sielcken, deceased. There-
3257 upon, and as a result of this return of all the seized assets, the Executor became vested with the right if a proper claimant under Section 9 and if the sole owner of the debt to file a claim on behalf of the firm of Crossman & Sielcken in liquidation; also on behalf of the Hermann Sielcken Estate for the recovery of the debt here concerned and to bring suit upon that claim to establish it under the Act, if possible. Section 9(d) confers upon an executor the same rights which the deceased, if living, would have been entitled to exercise under the Act, but no greater rights. The rights of the executor therefor were limited to those which Hermann Siel-
3258 cken, if living, would have been entitled to exercise. But a debt claim could be filed under Section 9 only by a person "not an enemy," so that the Sielcken Executor, although a party owner of the debt, was not qualified to be a claimant. Miller v. Schutte, 287 Fed. 604, appeal dismissed, 263 U. S. 730; Garvin v. Kogler, 272 Fed. 442.

The debt sued upon was founded upon shipments of merchandise by the firm of Crossman & Sielcken together with Theodor Wille of Hamburg, Germany, an enemy firm, pursuant to an agreement that the merchandise should belong in undivided shares to Crossman & Sielcken and the firm of Theodor Wille. The adventure, consisting of the purchase, shipment and sale of the merchandise abroad was for their joint account. That suit was brought upon the claim for the entire amount by American citizens does not cure the defect in view of the fact

of the joint one-half ownership in it by the enemy firm of Theodor Wille. And the plaintiffs could not file the claim as Wille's assignee for this was prohibited under Sections 7(b) and 9(b) of the Act.

The Government contends that the plaintiffs, notwithstanding they knew that Wille, an enemy had a one-half interest in the claim upon which the suit was based, stated under oath that the claim was not filed in collusion with an enemy, thus filed a claim which they were not legally entitled to make and one not cognizable under the Act. On the other hand, the Irving Trust Co., as Executor of Hermann Sielcken, deceased, contends that 3260
all claims of Theodor Wille to any interest in any recovery in the suit had been released prior to 1924 by a settlement made by Clara Sielcken Schwarz (widow and residuary legatee of Hermann Sielcken) with the firm of Theodor Wille and the consequent charging off of such claim to profit and loss on the books of Crossman & Sielcken. From this it would appear that Theodor Wille retained his interest in the cargoes from October 6, 1917, until sometime in 1924, and from that time on the chose in action was owned entirely by the Irving Trust Co., as Executor of Hermann Sielcken, which nominated Sorenson & Nielsen to file a debt claim and to bring the suit as 3261
surviving partners and sole owners of the debt claim. But Theodor Wille was an enemy and so could neither legally file a claim nor bring suit as a debt claimant, and the Irving Trust Co., as Executor of Sielcken, or Sorenson & Nielsen, as assignees of Wille's claim were in no better position than Wille himself.

The Government urges that the reason why suit to establish the claimed debt was brought in the name of the plaintiffs instead of the true owners and why the actual ownership of the debt was not disclosed and asserted, and the reason why the suit was brought by parties plaintiff collusively, as the Government charges, was because the Act provided no remedy for the payment of a debt claim to the Executor of Hermann Sielcken, an enemy, and that as the debt sued upon was owned jointly by an enemy, firm and the Executor of an enemy,

the Act precluded the administrative allowance or the judicial determination of a claim so owned. To support this contention the Government refers to the following testimony of Brainard S. Avery, attorney of record for the plaintiffs in the suit:

"Q. Whose idea was it to bring the suit in the District Court in the names of Sorenson & Nielsen without mentioning the executor or joining the executor as a party? A. I think it was mine.

"Q. What reason had you for proceeding in that way?
A. I wanted to make the suit stick.
3263 "Q. What had the omission of the executor from that suit to do with that matter?

• • • • • •

"Q. In your judgment? A. At that time, all of 1927, I knew that Mr. Sielcken had died in an enemy country, that under the Trading with the Enemy Act he had an enemy status, that Mr. Sorenson and Mr. Nielsen had no such obstacles to overcome, the executor not being in any better position than Mr. Sielcken himself. • • •

"Q. At the time you prepared that bill, you were familiar, were you not, both with the articles of co-partnership and the will? A. The bill was prepared in the
3264 first instance by Mr. Barnes, but we were both familiar with the papers."

The testimony given by the attorney of record for the plaintiffs, Brainard Avery, in Matter of Sielcken, 162 Misc. 54, is also referred to and his statement: "• • • agreement was that right straight through there should be an even division, even extending to the moneys in possession of the Alien Property Custodian" and the estate "was to take one-half and the Germans were to get the other half, or to be released from the other half • • •" (p. 1662, Avery testimony, Ex. T. Sterck, aff.).

It is clear from the foregoing that the controversy involved in the suit in which the plaintiffs obtained the decree which the Government now seeks to vacate,

although nominally between the plaintiffs, as alleged non-enemy surviving partners of the firm of Crossman & Sielcken, and the defendants was actually and substantially a controversy between an executor of an enemy jointly interested with an enemy firm and the defendants; furthermore, it appears that Sorenson and Nielsen were collusively made parties plaintiff for the purpose of "creating a case cognizable" under the Trading with the Enemy Act. A situation comparable with that is the case of Cashman v. Amador, etc., Canal Co., 118 U. S. 58, in which the Court said:

3266

"* * * the name of Cashman was used with his consent, because the county could not sue in its own name in the Circuit Court of the United States. The recital shows in express terms that the suit was brought for the benefit of the county, because it desired to restrain the miners in the bed of the river, and it could not sue therefore in its own name in the courts of the United States. * * * From the very beginning the suit was and is in reality the suit of the county, with a party plaintiff 'collusively made,' 'for the purpose of creating a case cognizable' by the Circuit Court of the United States under the act of March 3, 1875. While, therefore, the 'dispute or controversy' 3267 'involved' is nominally between Cashman, an alien, and the defendants, citizens of California, it is 'really and substantially' between one of the counties of California and citizens of that State, and thus not 'properly within the jurisdiction' of the Circuit Court."

See also Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327; Farmington v. Pillsbury, 114 U. S. 138; Williams v. Nottaws, 104 U. S. 209; Hawes v. Oakland, 104 U. S. 450.

The actual owners of the claim were not entitled to bring suit under the Act, nor were the nominal plaintiffs in a position to sue upon this claim under the Act.

It is quite true no objection as to jurisdiction was made by counsel for the Government upon the trial,

but this could not confer jurisdiction in the face of the express limitations of Section 9 of the Trading with the Enemy Act. Banco Mexicano v. Deutsche Bank, 263 U. S. 591; Cummings v. Isenberg, 89 Fed. (2nd) 489, cert. denied 301 U. S. 682. And consent of the parties may not cure a defect in jurisdiction in violation of the Judiciary Act. Chicago, Burlington & Quincy Ry. Co. v. Willard, 220 U. S. 413; Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan, 111 U. S. 379. The question of jurisdiction over the parties or the subject-matter was not raised at the trial
3269 of the case at bar.

This is not an instance of the erroneous or irregular exercise of jurisdiction where the decree might be voidable. It is an instance where the special statute in which the Government has consented to be sued and under which the suit is purported to be brought, definitely limits the jurisdiction of the court to a certain class of litigants. Jurisdiction beyond that class is not conferred on the court and it had no jurisdiction of the case at bar.

Although the general rule is that a final decree or judgment may not be vacated after the expiration of
3270 the term of the court which rendered it, there is an exception to this rule where it appears that the decree was void for want of jurisdiction. United States v. Ickes, 84 Fed. (2nd) 257 (Court of Appeals, District of Columbia); Clark v. Arizona Mutual Savings & Loan Assoc., 217 Fed. 640; Woods Bros. Const. Co. v. Yankton County, 54 Fed. (2nd) 304 (C. C. A. 8); see also Standard Oil Co. v. Missouri, 224 U. S. 270, at p. 281; Windsor v. McVeigh, 93 U. S. 274, at p. 282; Reynolds v. Stockton, 140 U. S. 254, at p. 268.

In the case at bar the bill did not allege a case within the jurisdiction of this Court; it was not an instance where the court was called upon or did determine the truth of an allegation respecting jurisdiction as in Denver First National Bank v. Klug, 186 U. S. 202, cited by counsel for respondent. It was a sim-

ilar situation to that in Vallely, etc., v. Northern Fire & Marine Ins. Co., 254 U. S. 348. The want of jurisdiction was apparent on the face of the bill, and since this court had no jurisdiction over the "rem" or over the parties, the decree was void—not merely voidable. Experts Rowland, 104 U. S. 604; Phebus v. Search, 264 Fed. 407 (C. C. A. 8); United States v. Turner, 47 Fed. (2nd) 86 (C. C. A. 8). A decree that is void because rendered without jurisdiction may be vacated upon motion during the term in which the decree is rendered, or afterwards. United States v. Turner (*supra*); United States v. Ickes (*supra*); City of Stuart v. Green, 91 Fed. (2nd) 603, cert. denied 302 U. S. 744. 3272

The Government refers to Rule 6(c) of the Rules of Civil Procedure which provides that "the expiration of a term of court in no way effects the power of a court to do any act or take any proceeding in a civil action which has been pending before it"; but this Rule is not applicable to the case at bar in view of the fact that the decree in question was entered in 1929 and that this proceeding was brought last May—long before the New Rules came into effect.

The Government also contends that the court lacked jurisdiction of the original suit because it was brought in the Southern District of New York instead of the Eastern District of New York, where the plaintiff, Sorenson, resided, or New Jersey, where Nielsen resided, or the District of Columbia, in accordance with Section 9(a) of the Act, in view of the fact that a partnership, unlike a corporation, is not given the right to institute a suit "where it has its principal place of business." However, as the motion is disposed of on the grounds discussed above, it is unnecessary to consider this contention. 3273

The respondent seems to question the right of the Attorney-General of the United States to make this motion. But the Attorney-General is the representative of the United States in its litigation, and moreover, the

3274 *Opinion of Goddard, J.*

Attorney-General has since July 1, 1934, when the Alien Property Custodian ceased to exist, become the successor in interest to the Alien Property Custodian. The Government is, of course, interested in the loss of funds which otherwise would have been available for the satisfaction of awards by the Mixed Claims Commissions to American citizens.

I think that the original suit was not properly within the jurisdiction of this court, and the decree entered therein is void. Accordingly, the motion to vacate the
3275 decree is granted.

January 30, 1939.

HENRY W. GODDARD,
U. S. D. J.

3276

Order. 3277

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

v.

HOWARD SUTHERLAND, as Alien Property Custodian; FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,

Defendants.

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken, deceased,

Intervenor.

In proceeding to vacate final decree of December 30, 1929.

Equity No. 44-28. 3278

3279

A motion having been made by Gregory F. Noonan, United States Attorney for the Southern District of New York, attorney for Honorable Frank Murphy, Attorney-General of the United States and as successor to the Alien Property Custodian, in behalf of the United State of America (by Francis J. McNamara and David W. Wainhouse, Esqs., of counsel) for an order substituting the Honorable Frank Murphy, as Attorney-General of the United States and as successor to the Alien Property Custodian in behalf of the United States of

3280 *Order*

America in lieu of the Honorable Homer S. Cummings, as Attorney-General of the United States and successor to the Alien Property Custodian in behalf of the United States of America, now resigned, and Gregory F. Noonan, United States Attorney for the Southern District of New York, attorney for the Honorable Frank Murphy, Attorney-General of the United States and successor to the Alien Property Custodian in behalf of the United States of America (Francis J. McNamara and David W. Wainhouse, Esqs., of counsel) having appeared in support of the motion, and Leonard B. Smith
3281 and Selden Bacon, Esqs., attorneys for Irving Trust Company, as executor of Hermann Sielcken, deceased (Selden Bacon, Esq., of counsel), having appeared in opposition thereto,

Now, upon reading and filing the notice of such motion and the affidavit of David W. Wainhouse thereto annexed, verified the 10th day of February, 1939, and the replying affidavit of Frank C. Stercke, verified the first day of March, 1939, in support of this motion, and the affidavits of Selden Bacon verified respectively the 20th day of February, 1939, and the 3rd day of March, 1939, in opposition thereto, and upon all the files
3282 and proceedings herein, and after hearing counsel in support of and in opposition to such motion and due consideration having been had, and on motion of Gregory F. Noonan, Esq., United States Attorney for the Southern District of New York, attorney for the Honorable Frank Murphy, Attorney-General of the United States and successor to the Alien Property Custodian in behalf of the United States of America, it is

Ordered, Adjudged and Decreed that the motion of Gregory F. Noonan, United States Attorney for the Southern District of New York, attorney for the Honorable Frank Murphy, Attorney-General of the United States, as successor to the Alien Property Custodian, in behalf of the United States of America, be and it is hereby granted, and it is further

Order

3283

Ordered, Adjudged and Decreed that the Honorable Frank Murphy, as Attorney-General of the United States and as successor to the Alien Property Custodian in behalf of the United States of America be and hereby is substituted in lieu of the Honorable Homer S. Cummings, as Attorney-General of the United States and as successor to the Alien Property Custodian in behalf of the United States of America.

Dated, New York, March 9, 1939.

(Signed) HENRY W. GODDARD.

3284

3285

3286 **Notice of Settlement of Proposed Order From John T. Cahill, United States Attorney for the Southern District of New York.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

3287 v.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m.b.H.,
Defendants,

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken,
Intervenor.

In proceeding to vacate final decree of December 30, 1929.

Notice of Settlement. Equity No. 44-28.

3288

Sirs:

Please Take Notice that the within order will be presented for settlement and signature to the Honorable Henry W. Goddard, United States District Judge, at the office of the Clerk in the United States Court House, Foley Square, Borough of Manhattan, City of New

Notice of Settlement of Proposed Order from John T. Cahill, United States Attorney for the Southern District of New York. 3289

York, on the date to be set by the Honorable Henry W. Goddard upon five days' notice to the attorneys.

Dated, New York, New York, March 11, 1939.

Yours, etc.,

JOHN T. CAHILL,
United States Attorney, Southern District of New York, Attorney for United States, 3290
Office & P. O. Address,
United States Court House, Foley Square,
Borough of Manhattan,
City of New York.

To:

Leonard B. Smith and Selden Bacon, Esqs.,
Attorneys for Irving Trust Company, as
Executor of Hermann Sielcken, deceased,
15 Broad Street,
New York, N. Y.

Garfield, Wrubel & Lazarus, Esqs.,
Attorneys for John S. Sorenson,
25 West 44th Street, 3291
New York, N. Y.

3292 **Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian.**

At a Stated Term of the United States District Court, held in and for the Southern District of New York, at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the.....day of March, 1939.

Present: Honorable Henry W. Goddard,
United States District Judge.

3293

JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

v.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants,

3294 IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken, deceased,
Intervenor.

In proceeding to vacate final decree of December 30, 1929.

Order.
Equity No. 44-28.

Francis J. McNamara, Special Assistant to the Attorney General of the United States, attorney of record for Frank Murphy, as Attorney General of the United States, on behalf of the United States and as successor to the Alien Property Custodian, having moved this Court for an order vacating the final decree entered in this cause on the 30th day of December, 1929, and for such other and further relief as this Court may deem just and proper in the premises, and said motion having been argued before this Court,

Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian 3295

Now, on reading and filing the affidavit of Frank C. Sterck, an attorney in the Department of Justice, verified the 18th day of May, 1938, and exhibits annexed thereto, the reply affidavit of Frank C. Sterck, verified the 15th day of September, 1938, and exhibits annexed thereto, and supplementary affidavit of Frank C. Sterck, verified the 10th day of October, 1938, with exhibits annexed thereto and second supplementary affidavit of Frank C. Sterck, verified the 25th day of October, 1938, with exhibits annexed thereto, all in support of the motion; 3296

The Chase National Bank of the City of New York, as ancillary executor of the Estate of Thorleif S. B. Nielsen, appearing specially by Chadbourne, Wallace, Park & Whiteside, Esqs. (Leonard P. Moore, Esq., of counsel), and having moved the Court by an order to show cause why an order should not be made and entered vacating, setting aside, cancelling and annulling service of the notice of motion, affidavit of Frank C. Sterck with exhibits attached thereto, on the Chase National Bank of the City of New York as ancillary administrator of the estate of Thorlief S. B. Nielsen, deceased, and the Court on the 15th day of June, 1938, 3297 having signed an order directing that the service of the notice of motion, affidavit of Frank C. Sterck with exhibits attached thereto, to vacate the final decree entered in this cause on the 30th day of December, 1929, served upon the Chase National Bank of the City of New York, as ancillary executor of the estate of Thorleif S. B. Nielsen, be vacated, annulled and declared to be of no effect;

John S. Sorenson having appeared by Garfield, Wrubel & Lazarus, Esqs., and having filed an affidavit verified the 18th day of June, 1938;

And the Irving Trust Company as executor of Hermann Sielcken, deceased, on its motion having been granted leave of Court by order of the 28th day of June, 1938, to intervene as a party in the above proceeding to vacate the decree of this Court of December 30, 1929, and having appeared by Leonard B. Smith

3298 *Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian*

and Selden Bacon, Esqs., and having filed the answering affidavit of Brainard Avery, verified the 11th day of August, 1938, with exhibits attached thereto, the affidavit of Richard S. Doyle, verified the 11th day of August, 1938, the affidavit of Charles D. Hamel, verified the 12th day of August, 1938, the affidavit of Frederick Wirth, Jr., verified the 29th day of July, 1938, the affidavit of Leonard B. Smith, verified the 11th day of
3299 August, 1938, the affidavit of William Abramson, verified the 5th day of August, 1938, the affidavit of George O. Castell, verified the 25th day of July, 1938, the affidavit of George E. Warren, verified the 28th day of June, 1938, with exhibits attached thereto, the affidavit of John F. McIlwain, verified the 12th day of August, 1938, the affidavit of Orrin R. Judd, verified the 30th day of July, 1938, the affidavit of Selden Bacon, verified the 12th day of August, 1938, with exhibit attached thereto, the rebutting affidavit of George E. Warren, verified the 23rd day of September, 1938, the rebutting affidavit of Brainard Avery, verified the 22nd day of September, 1938, the rebutting affidavit of Selden Bacon,
3300 verified the 23rd day of September, 1938, and exhibits attached thereto, the rebutting affidavit of George W. Alger, verified the 7th day of September, 1938, and the affidavit of Brainard Avery, verified the 20th day of October, 1938, with exhibit attached thereto, in reply to supplemental affidavit of Frank C. Sterck, the affidavit of Selden Bacon, verified the 18th day of October, 1938, in reply to supplemental affidavit of Frank C. Sterck, all in opposition to said motion.

Upon filing the opinion of the Court and on motion of Francis J. McNamara, Special Assistant to the Attorney General, attorney of record for Frank Murphy, as Attorney General of the United States, on behalf of the United States and as successor to the Alien Property Custodian, it is hereby

Ordered, Adjudged and Decreed, that the motion to vacate the final decree entered in this cause on the 30th

Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian 3301

day of December, 1929, be and the same is hereby granted, and it is further

Ordered, Adjudged and Decreed that the final decree entered in this cause on the 30th day of December, 1929, be and the same is hereby vacated, annulled, set aside and declared to be void and of no effect whatsoever, and it is further

Ordered, Adjudged and Decreed that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, were collusively 3302 made parties plaintiff for the purpose of creating a cause cognizable under the Trading with the Enemy Act, and it is further

Ordered, Adjudged and Decreed that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman and Sielcken, were nominal party plaintiffs in the instant suit and retained none of the moneys paid them by Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, out of moneys and property of the United States, pursuant to the decree of this Court, entered on the 30th day of December, 1929, and 3303 it is further

Ordered, Adjudged and Decreed that the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, was the real party in interest in the instant suit and that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, handed over to the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, all of the moneys and property paid by Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, out of moneys and property of the United States, pursuant to the decree entered in this Court on the 30th day of December, 1929, and it is further

Ordered, Adjudged and Decreed that Frank Murphy, as Attorney General of the United States in behalf of the

3304 *Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian*

United States, and as successor to the Alien Property Custodian, do have and recover of and from the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, Intervenor, the sum of $727,618.93, with interest thereon at six per cent from April 10, 1930, to the date of payment of this judgment, together with the costs of this action to be taxed, and that said Irving Trust Company, as executor of Hermann
3305 Sielcken, deceased, Intervenor, pay said sums to said Frank Murphy, as Attorney General of the United States in behalf of the United States, and as successor to the Alien Property Custodian, within twenty days, in default of which payment said Frank Murphy, as Attorney General of the United States in behalf of the United States, and as successor to the Alien Property Custodian, shall have execution therefor, and it is further

Ordered, Adjudged and Decreed that the bill of complaint herein be and hereby is dismissed for want of jurisdiction.

3306 Dated, New York, N. Y., March , 1939.

.....

U. S. D. J.

Order Vacating Final Decree of December 30, 1929. 3307

At a Stated Term of the United States District Court held in and for the Southern District of New York, at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 28 day of April, 1939.

Present: Honorable Henry W. Goddard,
United States District Judge.

JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Seilcken, Plaintiffs,

v.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H., Defendants.

In Proceedings to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken, deceased, Intervenor.

3308

Order.

Equity No. 44-28.

3309

Lamar Hardy, United States Attorney for the Southern District of New York, as attorney for the United States, having on notice of motion, dated May 18th, 1938, moved this court "for an order vacating the final decree entered in this cause on the 30th day of December, 1929, on the ground that said final decree is void because this Court was without jurisdiction to enter the same"; and said motion having been argued before this Court,

Now, on reading and filing the affidavit of Frank C. Sterck, an attorney in the Department of Justice, verified

the 18th day of May, 1938, and exhibits annexed thereto, the reply affidavit of Frank C. Sterck, verified the 15th day of September, 1938, and exhibits annexed thereto, and supplementary affidavit of Frank C. Sterck, verified the 10th day of October, 1938, with exhibits annexed thereto and second supplementary affidavit of Frank C. Sterck, verified the 25th day of October, 1938, with exhibits annexed thereto, all in support of the motion;

The Chase National Bank of the City of New York, as ancillary executor of the Estate of Thorleif S. B.
3311 Nielsen, appearing specially by Chadbourne, Wallace, Park & Whiteside, Esqs. (Leonard P. Moore, Esq., of counsel), and having moved the Court by an order to show cause why an order should not be made and entered vacating, setting side, cancelling and annulling service of the notice of motion, affidavit of Frank C. Sterck with exhibits attached thereto, on the Chase National Bank of the City of New York as ancillary administrator of the estate of Thorlief S. B. Nielsen, deceased, and the Court on the 15th day of June, 1938, having signed an order directing that the service of the notice of motion, affidavit of Frank C. Sterck with exhibits
3312 attached thereto, to vacate the final decree entered in this cause on the 30th day of December, 1929, served upon the Chase National Bank of the City of New York, as ancillary executor of the estate of Thorlief S. B. Nielsen, be vacated, annulled and declared to be of no effect;

John S. Sorenson having appeared by Garfield, Wrubel & Lazarus, Esqs., and having filed an affidavit, verified the 18th day of June, 1938;

And the Irving Trust Company, as executor of Hermann Sielcken, deceased, on its motion having been granted leave of Court by order of the 28th day of June, 1938, to intervene in the above proceeding to vacate the decree of this Court of December 30, 1929, as one having acquired an interest under the decree subsequent thereto, and having so appeared by Leonard B. Smith and Selden

Bacon, Esqs., and having filed the answering affidavit of Brainard Avery, verified the 11th day of August, 1938, with exhibits attached thereto, the affidavit of Richard S. Doyle, verified the 11th day of August, 1938, the affidavit of Charles D. Hamel, verified the 12th day of August, 1938, the affidavit of Frederick Wirth, Jr., verified the 29th day of July, 1938, the affidavit of Leonard B. Smith, verified the 11th day of August, 1938, the affidavit of William Abramson, verified the 5th day of August, 1938, the affidavit of George O. Castell, verified the 25th day of July, 1938, the affidavit of George E. 3314
Warren, verified the 28th day of June, 1938, with exhibits attached thereto, the affidavit of John F. McIlwain, verified the 12th day of August, 1938, the affidavit of Orrin R. Judd, verified the 30th day of July, 1938, the affidavit of Selden Bacon, verified the 12th day of August, 1938, with exhibit attached thereto, the rebutting affidavit of George E. Warren, verified the 23rd day of September, 1938, the rebutting affidavit of Brainard Avery, verified the 22nd day of September, 1938, the rebutting affidavit of Selden Bacon, verified the 23rd day of September, 1938, and exhibits attached thereto, the rebutting affidavit of George W. Alger, verified the 7th day of September, 1938, and the affidavit of Brainard 3315
Avery, verified the 20th day of October, 1938, with exhibit attached thereto, in reply to supplemental affidavit of Frank C. Sterck, the affidavit of Selden Bacon, verified the 18th day of October, 1938, in reply to supplemental affidavit of Frank C. Sterck; and also upon the original bill filed herein by Sorenson and Nielsen, the answer to that bill by the Alien Property Custodian and the United States Treasurer, and the answer to that bill of the Zentral Einkaufs Gesselschaft m. b. H. and the decree of December 30, 1929, entered in this Court in opposition to the said motion; and this Court having, by its order of March 9, 1939, substituted Honorable Frank Murphy as Attorney-General of the United States and successor to the Alien Property Custodian for Honorable Homer S. Cummings, his predecessor in office;

3316 *Order Vacating Final Decree of December 30, 1929*

Now, upon all of the above-mentioned papers, and upon filing the opinion of this Court, and after hearing Francis J. McNamara, Esq., Special Assistant to the Attorney-General, on behalf of the Attorney-General and of the United States, in support of said motion, and Honorable Nathan L. Miller and Selden Bacon, Esq., in opposition thereto; and due consideration having been had,

It is hereby

Ordered, Adjudged and Decreed that the said motion
3317 to vacate the final decree entered in this cause on the 30th day of December, 1929, be, and the same is hereby granted; and it is further

Ordered, Adjudged and Decreed that the said final decree entered in this cause on the 30th day of December, 1929, be, and the same is, hereby vacated, annulled, set aside and declared to be void and of no effect whatsoever because this Court was without jurisdiction to enter the same.

HENRY W. GODDARD,
U. S. D. J.

3318

Notice of Appeal by Irving Trust Company. 3319

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

v.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m.b.H.,
Defendants, 3320

In proceeding to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken,
Intervenor.

Equity No. 44-28.

Sirs:

Please Take Notice That: 3321

The Irving Trust Company as Executor of Hermann Sielcken, deceased, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order and decree of the above-named District Court, signed by Hon. Henry W. Goddard, District Judge, dated and entered on the 28th day of April, 1939, in the office of the Clerk of the United States District Court for the Southern District of New York, in the above entitled proceeding to vacate, vacating and setting aside the decree of said United States District Court for the Southern District of New York in the original suit above entitled, of date the 30th day of December, 1929; and

3322 *Notice of Appeal by Irving Trust Company*

from each and every part of said order and decree of April 28th, 1939.

Dated, New York, May 12th, 1939.

Yours respectfully,

LEONARD B. SMITH and SELDEN BACON,
Solicitors for the Irving Trust Company
as Executor of Hermann Sielcken, Deceased,
Office & Post Office Address,
3323 15 Broad Street,
Borough of Manhattan,
New York City, N. Y.

To:
Charles Weiser, Esq.,
Clerk of the United States District Court,
for the Southern District of New York.
And to:
John T. Cahill, Esq.,
United States District Attorney for the
Southern District of New York,
Solicitor for the United States,
United States Court House,
3324 Foley Square, New York City.
Francis J. McNamara, Esq.,
Solicitor for Hon. Frank Murphy, as Attorney General of the United States,
United States Court House,
Foley Square, New York City.
Garfield, Wrubel & Lazarus, Esqs.,
Solicitors for John S. Sorenson,
25 West 44th Street,
New York City.

(Filed with bond for costs on appeal on May 13th, 1939 in the office of the Clerk of the United States District Court for the Southern District of New York.)

Notice of Cross Appeal. 3325

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against

HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,

Defendants.

In proceedings to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken, deceased,

Intervenor.

3326

Equity No. 44-28

Sirs: 3327

Please Take Notice that Frank Murphy, as Attorney General of the United States, and as successor to the Alien Property Custodian, on behalf of the United States of America, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order and decree of the above-named District Court, signed by the Honorable Henry W. Goddard United States District Judge, in the Office of the Clerk of the United States District Court, dated and entered on the 28th day of April, 1939, in the Office of the Clerk of the United States District Court for the Southern District of New York, in the above-entitled proceeding to vacate, vacating and setting aside the decree of the United States District Court for the Southern District of New York, dated the 30th day of December, 1929, insofar as said order failed to order,

3328 *Notice of Cross Appeal*

adjudge and decree that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, were collusively made parties plaintiff for the purpose of creating a cause cognizable under the Trading with the Enemy Act; that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman and Sielcken, were nominal party plaintiffs in the instant suit and retained none of the moneys paid them by Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, out of moneys and property of the United States,
3329 pursuant to the decree of this Court entered on the 30th day of December, 1929; that the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, was the real party in interest in the instant suit and that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, handed over to the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, all of the moneys and property paid by Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, out of moneys and property of the United States, pursuant to the decree entered
3330 in this court on the 30th day of December, 1929; and that Frank Murphy, as Attorney-General of the United States in behalf of the United States, and as successor to the Alien Property Custodian, have and recover of and from the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, Intervenor, the sum of $727,618.93, with interest thereon at six per cent from April 10, 1930, to the date of payment of this judgment, together with the costs of this action to be taxed; and that said Irving Trust Company, as executor of Hermann Sielcken, deceased, Intervenor, pay said sums to said Frank Murphy, as Attorney-General of the United States in behalf of the United States, and as successor to the Alien Property Custodian, within twenty days, in default of which payment, said Frank Murphy, as Attorney-General of the United States in be-

half of the United States, and as successor to the Alien Property Custodian, shall have execution therefor; and that the bill of complaint herein be dismissed for want of jurisdiction.

Dated, New York, N. Y., May 23, 1939.

Yours, etc.,

JOHN T. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for United States. 3332
FRANCIS J. McNAMARA,
Special Assistant to the Attorney-General,
Attorney for Honorable Frank Murphy,
as Attorney-General for the United
States,
Office and Post Office Address,
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

To:

LEONARD B. SMITH & SELDEN BACON, Esqs., 3333
Attorneys for Irving Trust Company as Executors
of Hermann Sielcken, deceased,
15 Broad Street,
New York, N. Y.

GARFIELD, WRUBEL & LAZARUS,
Attorneys for John S. Sorenson,
25 West 44th Street,
New York, N. Y.

(Filed in the office of the Clerk of the District Court of the United States for the Southern District of New York on May 23rd, 1939.)

3334 **Stipulation.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against

3335 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,

Defendants.

Equity No. 44-28.

In Proceedings to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the estate of Hermann Sielcken, deceased,

Interventor.

3336 It Is Hereby Stipulated And Agreed that the foregoing, Volume I containing pages 5 to 621 and this Volume II containing pages 622 to 1111, is a true transcript of the entire record of the said District Court in the above-entitled proceeding to vacate the decree of December 30, 1929, as agreed upon by the parties.

Dated, New York, August 4th, 1939.

LEONARD B. SMITH AND SELDEN BACON,
Attorneys for the Irving Trust Company
as Executor of Herman Sielcken, Deceased.

3337

FRANCIS J. McNAMARA,
Special Assistant to the Attorney General of the United States of America, Attorney for Frank Murphy, Attorney General of the United States on behalf of the United States and as Successor to the Alien Property Custodian, Office of United States Attorney, Foley Square, New York, N. Y.

JOHN J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States, United States Court House, Foley Square, New York City.

3338

GARFIELD, WRUBEL & LAZARUS,
Attorneys for John Sorenson.

3339

3340 **Clerk's Certificate.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against

3341 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,

Defendants.

In Proceedings to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the estate of Hermann Sielcken, deceased,

Interventor.

Equity No. 44-28.

3342 I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, hereby certify that the foregoing, contained in Volume I, pages 5 to 622, and this Volume II, containing pages 622 to 1111, is a true copy of the record of the said District Court in the above-entitled proceeding to vacate the decree of December 30, 1929, as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said District Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 7th day of August, in the year of our Lord, One thousand nine hundred thirty-nine, and of the Independence of the said United States, the One hundred sixty-fourth.

CHARLES WEISER,
Clerk of the United States District Court for the Southern District of New York.

(Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN S. SORENSON AND THORLEIF S. B. NIELSEN, AS THE SURVIVING PARTNERS OF THE FIRM OF CROSSMAN & SIELCKEN, PLAINTIFFS

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, FRANK WHITE, AS TREASURER OF THE UNITED STATES, AND ZENTRAL EINKAUFS GESELLSCHAFT, M. B. H., DEFENDANTS

In Proceedings to Vacate Final Decree of December 30, 1929

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, INTERVENOR IN PROCEEDING TO VACATE, APPELLANT, AND RESPONDENT ON CROSS-APPEAL

THE ATTORNEY-GENERAL OF THE UNITED STATES ON BEHALF OF THE UNITED STATES AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, RESPONDENT AND CROSS-APPELLANT

THE UNITED STATES OF AMERICA, RESPONDENT

JOHN S. SORENSON, DEFENDANT-RESPONDENT

Notice of motion

SIRS: Please take notice that upon the annexed affidavit of David W. Wain[illegible]ouse, assistant United States Attorney, sworn to the 29th day of January 1940, the undersigned will move this Court at a stated term thereof for the hearing of motions, to be heard in the United States Court House, on the 13th day of February 1940 at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order substituting Honorable Robert H. Jackson, as Attorney General of the United States, and successor to the Alien Property Custodian in behalf of the United States of America, in place of Honorable Frank Murphy, as Attorney General of the United States, and successor to the Alien Property Custodian in behalf of the United States of America, now resigned.

Dated: New York, January 29, 1940.

Yours, etc.,

JOHN T. CAHILL,

United States Attorney for the Southern District of New York, Attorney for Honorable Robert H. Jackson, Attorney General of the United States, and as successor to the Alien Property Custodian in behalf of the United States of America, United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

229836—40

To:

LEONARD B. SMITH AND SELDEN BACON, *Esqs.*,
Attorneys for Irving Trust Company as Executor
Herman Sielcken, deceased, 15 Broad Stre
New York, N. Y.

GARFIELD, WRUBEL & LAZARUS, *Esqs.*,
Attorneys for John S. Sorenson, 25 West 44th Stre
New York, N. Y.

United States Circuit Court of Appeals for the Second Circuit

JOHN S. SORENSON AND THORLEIF S. B. NIELSEN, AS THE SURV
ING PARTNERS OF THE FIRM OF CROSSMAN & SIELCK
PLAINTIFFS

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, FRA
WHITE, AS TREASURER OF THE UNITED STATES, AND ZENTR
EINKAUFS GESELLSCHAFT, M. B. H., DEFENDANTS

In Proceedings to Vacate Final Decree of December 30, 192

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCK
DECEASED, INTERVENOR IN PROCEEDING TO VACATE, APPELLA
AND RESPONDENT ON CROSS-APPEAL

THE ATTORNEY GENERAL OF THE UNITED STATES ON BEHALF
THE UNITED STATES AND AS SUCCESSOR TO THE ALIEN PROPE
CUSTODIAN, RESPONDENT AND CROSS-APPELLANT

THE UNITED STATES OF AMERICA, RESPONDENT

JOHN S. SORENSON, DEFENDANT-RESPONDENT

Affidavit

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

David W. Wainhouse, being duly sworn, deposes and says t
he is an Assistant United States Attorney for the Southern D
trict of New York, and as such is in charge of the above entit
matter.

That by the order of the United States District Court for
Southern District of the United States, Honorable Frank Murp
was substituted in the place of Honorable Homer S. Cummi
as Attorney General of the United States and successor to
Alien Property Custodian, in behalf of the United States
America.

That Honorable Frank Murphy has resigned from the office of Attorney General of the United States and has been succeeded by Honorable Robert H. Jackson in that capacity.

Wherefore, your deponent prays that Honorable Robert H. Jackson as Attorney General of the United States and successor to the Alien Property Custodian in behalf of the United States of America be substituted for Honorable Frank Murphy as Attorney General of the United States and successor to the Alien Property Custodian in behalf of the United States of America in this cause.

DAVID W. WAINHOUSE.

Sworn to before me this 29th day of January 1940.

ISADORE M. FUCHS,
Notary Public, Bronx County.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of February one thousand nine hundred and forty.

Present: Hon. THOMAS W. SWAN, Hon. AUGUSTUS N. HAND, Hon. ROBERT P. PATTERSON, Circuit Judges.

JOHN S. SORENSON AND THORLIEF S. B. NIELSON, PLAINTIFFS

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, ET AL., DEFENDANTS; IRVING TRUST CO., AS EXECUTORS; ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

A motion having been made herein by counsel for the Attorney General of the United States for an order substituting Honorable Robert H. Jackson, as Attorney General of the United States, and successor to the Alien Property Custodian in behalf of the United States of America, in place of Honorable Frank Murphy, as Attorney General of the United States, and successor to the Alien Property Custodian in behalf of the United States of America, now resigned,

Upon consideration thereof it is ordered that said motion be and hereby is granted.

D. E. ROBERTS, *Clerk.*

Order

United States Circuit Court of Appeals, Second Circuit. Feb. 14, 1940. D. E. Roberts, Clerk.

United States Circuit Court of Appeals for the Second Circui

No. 99—October Term, 1939

(Argued November 16, 1939. Decided February 19, 1940)

JOHN S. SORENSON AND THORLEIF S. B. NIELSEN, AS THE SURVIVING PARTNERS OF THE FIRM OF CROSSMAN & SIELCKEN, PLAINTIFFS

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, FRANK WHITE, AS TREASURER OF THE UNITED STATES, AND ZENTRAL EINKAUFS GESELLSCHAFT, M. B. H., DEFENDANTS

In Proceedings to Vacate Final Decree of December 30, 1929

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, INTERVENOR IN PROCEEDING TO VACATE, APPELLANT AND RESPONDENT ON CROSS-APPEAL

THE ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, RESPONDENT AND CROSS-APPELLANT

THE UNITED STATES OF AMERICA, RESPONDENT

JOHN S. SORENSON, DEFENDANT-RESPONDENT

Appeal from United States District Court for the Southern District of New York.

Appeal by Irving Trust Company as executor of Herman Sielcken, deceased, from an order of the United States District Court for the Southern District of New York dated April 28, 193 which vacated a final decree of the same court entered on Decem ber 30, 1929, after a trial before Judge Caffey. The decree s vacated directed the Alien Property Custodian and the Treasure of the United States to pay to the plaintiffs John S. Sorenso and Thorleif S. B. Nielsen as surviving partners of the firm o Crossman & Sielcken, out of property seized by the Alien Property Custodian in the name of Zentral-Einkaufs-Gesellschaft, m. b. H. (hereinafter termed Z. E. G.) the sum of $716,160.37 and interest No appeal was taken from the decree of December 30, 1929, and the amount awarded thereby was paid by the Alien Property Custodian and the Treasurer of the United States to the plaintiffs o April 10, 1930. The suit in which the decree was entered was brought by Sorenson and Nielsen as surviving partners of Cross man & Sielcken against the Alien Property Custodian, the Treasurer of the United States and Z. E. G.

The bill of complaint alleged in Article "First" that Sorenson, Nielsen and one Hermann Sielcken, "all being citizens and residents of the United States, were engaged in business * * * as copartners doing business under the firm name and style of Crossman & Sielcken, and said partnership continued * * * business * * * up to the date of the death of Hermann Sielcken * * *."

It alleged in Article "Second" that Crossman & Sielcken at all times "has had its principal place of business in the Borough of Manhattan, City, State and Southern District of New York, * * * has been and is a resident of said Borough of Manhattan, City and State of New York, * * * has not at any time been a resident within territory (including that occupied by the military and naval forces) of any nation with which the United States was at war and was not, nor at any time has it been, an enemy or ally of enemy within the meaning and purview of those terms as used and defined in the Act of October 6, 1917, known as * * * the Trading with the Enemy Act, or in any act amendatory thereof and supplemental thereto."

The bill went on to allege that Z. E. G. was a corporation organized about the month of January 1915 under the laws of Germany, with its principal place of business in the City of Berlin and that it succeeded to all of the business assets and liabilities of the Reichseinkauf which was a purchasing agent of the German Government; that in September 1914 Reichseinkauf entered into an agreement with Crossman & Sielcken, under the terms of which the latter was employed to purchase mixed cargoes of wheat, tea, cocoa, and mixed animal feed for account of Reichseinkauf to be shipped by neutral vessels from American ports to neutral Baltic ports and that Crossman & Sielcken were to be reimbursed for the invoice price, freight, and insurance, and to be paid a commission of 10 per cent on the value of the cargoes; that thereafter Reichseinkauf and its successor Z. E. G. instructed Crossman & Sielcken to stop shipments of wheat and flour and in their place to purchase pure lard, fat backs, near backs, short backs, clear backs, cakes, and cereals. The complaint further alleged that between February 27, 1915 and April 28, 1915 certain merchandise of the character above mentioned was purchased by Crossman & Sielcken and shipped in certain vessels consigned to Harry Levin and Becknann & Jorgensen, agents of Z. E. G. at Copenhagen, Denmark. It set forth six different shipments made by Crossman & Sielcken in February, March and April 1915, alleged that they were seized by the British Naval Authorities and condemned in the British Prize Court, that Crossman & Sielcken had not been reimbursed for the invoice value, insurance and freight or paid any part of their 10 per cent commission on the shipments, with the exception of $8,050.44 for certain merchandise shipped on one of the vessels.

The bill further alleged that the invoice value, freight, insura and commission due and owing to the plaintiffs amounted $380,761.54, plus interest; that Hermann Sielcken died on Octo 8, 1917, that the plaintiffs as surviving partners were under a d to wind up the business of the firm and that they filed their bill enforce the rights given the partnership under Section 9, sub vision (a) of the Trading with the Enemy Act as amended.

The bill finally alleged that the Alien Property Custodian the Treasurer of the United States held property amounting $669,155.00 which had been theretofore transferred or paid to Alien Property Custodian or seized by him as property belong to or held for the benefit of Z. E. G. which was an enemy wit the meaning of that term as used in the Trading with the Ene Act; that on November 12, 1927 the plaintiffs as surviving pa ners of Crossman & Sielcken filed a notice of their claim with Alien Property Custodian in conformity with Section 9 (a) of Trading with the Enemy Act, as amended.

The bill concluded by praying that a decree be entered est lishing the debt claimed by the plaintiffs to be due and owing Crossman & Sielcken by Z. E. G. and ordering payment ther to them as surviving partners.

Z. E. G. filed its answer to the bill denying the allegation th Sielcken was a resident of the United States and that the pa nership was not "an enemy or ally of enemy" and that Z. E. was indebted to Crossman & Sielcken. It alleged by way of se arate defense that when war was declared on April 6, 1917 Sielck resided in Germany and became an alien enemy and that the fi of Crossman & Sielcken was dissolved thereby; that title to assets was thereafter held by the Alien Property Custodian trustee and he had never returned or otherwise released the ass to Crossman & Sielcken or to the plaintiffs as surviving partne The answer further alleged that the claim asserted by the plai tiffs belonged not to them but to the estate of Sielcken, the d ceased partner, that Crossman & Sielcken had a joint account wi the firm of Theodore Wille & Company of Hamburg, Germa under the terms of which the latter had an equal interest with t firm of Crossman & Sielcken in the shipments and that Theodo Wille & Company was accordingly a necessary party.

The Alien Property Custodian and the Treasurer of the Unit States also answered the bill and moved to dismiss the same the ground that it appeared on its face that no debt was owing the plaintiffs by Z. E. G. and that they had not stated facts suf cient to entitle them to equitable relief under the provisions of t Trading with the Enemy Act. It also alleged that those defen ants were without knowledge as to the averments of the bill th Hermann Sielcken was a resident of the United States and th the partnership was not an enemy or ally of enemy and th Z. E. G. was indebted to the firm in the sum of $380,761.54 a interest.

After hearing the proofs Judge Caffey found that Z. E. G. was indebted to the plaintiffs in the sum of $380,761.54 and interest and that the defendants should transfer to the plaintiffs out of the money seized by the Alien Property Custodian and held by him or the Treasurer the sum of $716,160.37.

The Attorney General on behalf of the United States and as successor to the Alien Property Custodian moved to vacate the decree of December 30, 1929 on the ground that jurisdiction to enter it was lacking. The court held that: "The plaintiffs neither prior nor subsequent to the death of Hermann Sielcken, were the owners of the debt claimed within the terms of the Act, and had no standing to invoke the jurisdiction of this court in this suit brought by them, either as individuals or as the alleged surviving partners of the firm of Crossman & Sielcken," but that on the contrary Hermann Sielcken during his lifetime, and his estate upon his death, owned the entire capital of the firm and for several years prior to his death on October 8, 1917 had been an enemy alien under Section 2 of the Act, so that Irving Trust Company as his executor was not qualified to be a claimant. In connection with the finding of lack of jurisdiction to enter the original decree in favor of the plaintiffs, the court said that: "The decree which the Government * * * seeks to vacate, although nominally between the plaintiffs, as alleged non-enemy surviving partners * * * and the defendants was actually and substantially a controversy between an executor of an enemy jointly interested with an enemy firm and the defendants; furthermore, it appears that Sorenson and Nielsen were collusively made parties for the purpose of creating a case cognizable under the Trading with the Enemy Act." Upon these findings the judge made an order under date of April 28, 1939, granting the motion to vacate the decree of December 30, 1929, and setting aside the decree "because this Court was without jurisdiction to enter the same". Irving Trust Company as executor of Sielcken having intervened in the suit appealed from the order. The Attorney General on behalf of the United States and as successor to the Alien Property Custodian filed a cross-appeal seeking restitution to the United States of the moneys paid under the decree of December 30, 1929 alleged to have been entered without jurisdiction.

Order dated April 28, 1939 vacating the decree of December 30, 1929 and declaring it void for lack of jurisdiction reversed and original decree reinstated.

Before L. HAND, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

Leonard B. Smith and Selden Bacon, Attorneys for Irving Trust Company as Executor of Hermann Sielcken, deceased, Appellant; Nathan L. Miller and Selden Bacon, Counsel.

Francis M. Shea, Assistant Attorney General, John T. Cahill, United States Attorney, Francis J. McNamara, Special Assistant

to the Attorney General, Frank C. Sterck and James A. Shipper, Attorneys, Department of Justice, for the Attorney General, Appellee and Cross-Appellant; David W. Wainhouse, Counsel.

AUGUSTUS N. HAND, Circuit Judge: A decree of the District Court dated December 30, 1929 adjudged that Z. E. G. was indebted to the plaintiffs in the sum of $380,761.54 and interest, aggregating altogether $716,160.37, and that the Alien Property Custodian and the Treasurer of the United States should pay that amount to the plaintiffs as surviving partners of Crossman & Sielcken out of property of Z. E. G. which had been seized by the Alien Property Custodian. The aggregate with interest accrued since the date of the decree was paid to the plaintiffs by the Alien Property Custodian and Treasurer on April 17, 1930. About nine years after entry of the foregoing decree it was vacated on the application of the Attorney General upon the ground that the court had lacked jurisdiction to entertain the suit and make the decree because Hermann Sielcken, a member of Crossman & Sielcken, had resided in Germany since 1914 and had thus become an enemy alien after war was declared. In our opinion the various issues involved in the motion to vacate the decree were before Judge Caffey and his decision was binding on the later court. Chicot County Drainage District v. Baxter State Bank, decided by the Supreme Court on January 2, 1940; Stoll v. Gottlieb, 305 U. S. 165.

The bill of complaint before Judge Caffey alleged that Sorenson, Nielsen and Hermann Sielcken were citizens and residents of the United States and were doing business under the name of Crossman & Sielcken up to the date of the death of Sielcken, that that firm had at all times been a resident of New York, had not been a resident within the territory of any nation with which the United States was at war and was not at any time an enemy or ally of enemy. Z. E. G. not only denied these allegations but also set up the separate defense that Sielcken resided in Germany when war was declared and that he became an enemy alien, that the firm of Crossman & Sielcken was dissolved by the declaration of war and that the claim asserted by the plaintiffs as surviving partners belonged to the estate of Sielcken and not to the plaintiffs as surviving partners. The government, likewise, attacked the bill both by way of demurrer and by answer and raised the same issues.

The adjudication by Judge Caffey that Z. E. G. owed the plaintiffs $716,160.17 and that they should recover that amount, necessarily involved findings that Sielcken resided in New York at the time of his death, that he was not an enemy alien within the meaning of the Trading with the Enemy Act and that the claim against Z. E. G. belonged to the plaintiffs as surviving and liquidating partners of Crossman & Sielcken. Section 9 (a) of the Act provides that "any person not an enemy or ally of enemy claiming any interest, right or title in any money or other prop-

y which may have been conveyed, transferred, assigned, de-
ered, or paid to the Alien Property Custodian or seized by him
eunder and held by him or by the Treasurer of the United
tes, or to whom any debt may be owing from an enemy or ally
enemy whose property or any part thereof shall have been con-
ed, transferred, assigned, delivered, or paid to the Alien Prop-
y Custodian or seized by him hereunder and held by him or
the Treasurer of the United States may file with the said custo-
n a notice of his claim under oath." The section goes on to
vide that such a claimant who has filed a notice of claim may
stitute a suit in equity * * * in the district court of the
ited States for the district in which such claimant resides
* * to establish the interest, right, title, or debt so claimed,
l if so established the court shall order the payment * * *
said claimant * * *."

By the decree of December 30, 1929 it was necessarily held
t the plaintiffs had filed their claim as required by the Trad-
with the Enemy Act and that Z. E. G. was an enemy alien
l owed moneys to the partnership to the amount of $716,160.37
udged to be due.

The statement in the opinion of the court below (fol. 3253)
t Article "Second" of the bill "as to non-enemy status" did not
ege facts sufficient to confer jurisdiction on the court seems to
ve disregarded the allegation in Article "First" that Sorenson,
elsen and Sielcken were "all * * * citizens and residents
the United States" and that of Article "Second" itself that the
rtnership of Crossman & Sielcken "was not, nor at any time has
been, an enemy or ally of enemy." These allegations were to
e effect that each member of the firm was at all times a resident
l citizen of the United States and the answers put them directly
issue.

In addition to the alleged defect in pleading the court was ap-
rently of the belief that if it found Sielcken to have been in
t a resident of Germany the issues raised by the original bill
l answers and necessarily determined in favor of the plaintiffs
Judge Caffey could be disregarded because his decision was
sed on erroneous findings affecting jurisdiction. But whatever
y have been the trend of the earlier authorities the decisions of
e Supreme Court in Chicot County Drainage District v. Baxter
ate Bank, decided January 2, 1940, and Stoll v. Gottlieb, 305
S. 165, make the decree of December 30, 1929, res judicata as
the issues involved in the motion to vacate. In rendering
at decree Judge Caffey was obliged to resolve disputed questions
fact on which his jurisdiction depended and his decision that
e jurisdictional facts were established cannot be collaterally
tacked. In Chicot County Drainage District v. Baxter State
nk, the Supreme Court held the parties to an action to be bound
a judgment of a United States District Court which neces-
ily involved recognition of an act as constitutional, even though

the act was later in another proceeding held to be invalid, Ashton v. Cameron County Dist., 298 U. S. 513, and the question as to its constitutionality had not expressly been raised in the former action. Attack on the former judgment on the ground that lack of jurisdiction made it void was therefore precluded. The government had the same opportunity to present the issue as to residence and citizenship of Sielcken in the trial before Judge Caffey as in the later proceeding and can gain no right to a second presentation.

The case at bar falls clearly within the rule of Stoll v. Gottlieb and of the Chicot County decision. Not only was there every opportunity to present the matters now relied on by the government in the trial before Judge Caffey, but those matters were expressly raised and argued before him. It is true that it was not argued to Judge Caffey that the material facts were "jurisdictional"; but it was urged that the plaintiffs had no right to sue under the Trading with the Enemy Act—which is the very issue of jurisdiction which is now before this court. Apart from the failure to use the word "jurisdiction" the parties to the previous trial could scarcely have raised the issue of right to sue more squarely. The answer of Z. E. G. alleged that title to the claim was held by the Custodian and that the German firm of Wille & Company had a half interest in the claim. In oral argument before Judge Caffey, dismissal of the action was asked by counsel for the government on the ground that Sielcken was an enemy under the Act.

The issues thus raised are the same issues which are pertinent on the "jurisdictional" question of right to sue under the Trading with the Enemy Act. Even if Judge Caffey was wrong in deciding these issues in favor of the plaintiffs the government should have taken an appeal from his decision if it wished to question it further. No appeal was taken and the merits of these questions cannot be now raised on a motion to vacate. No more is thus requested than a reconsideration of matters on which there was a full hearing. Once lost, the right to appeal cannot be regained in this circuitous manner.

The decision in Vallely v. Northern Fire Ins. Co., 254 U. S. 348, was strongly relied upon by the court below, but the distinction between that case and the case at bar is the same one pointed out by Justice Reed when distinguishing it from Stoll v. Gottlieb, namely, that in Vallely v. Northern Fire Ins. Co. the question of jurisdiction had not been litigated in the prior suit, whereas in Stoll v. Gottlieb and in the case at bar it was. But in Chicot County Drainage District v. Baxter State Bank, supra, an earlier decision was held binding even though the question of jurisdiction had not been raised at the first trial, because it might have been raised there and was necessarily involved.

The court below, in the course of its opinion, stated that the plaintiffs were made parties "for the purpose of 'creating a case

gnizable' under the Trading with the Enemy Act" and that the ecree was, therefore, collusively obtained. But the right of the laintiffs to sue was the very matter in issue before Judge Caffey. he objections to their claim because their partner Sielcken was n enemy alien and was the sole owner of the capital of the partership and their firm was engaged in a joint enterprise with Ville & Company, an alleged enemy alien concern, were all overuled by Judge Caffey. There can be no basis for impeaching his ecree in a new litigation on the very grounds urged at the original rial (United States v. Throckmorton, 98 U. S. 61, 66), even hough those grounds were jurisdictional. Stoll v. Gottlieb, 305 J. S. 165.

Although the government only moved to set the decree aside or lack of jurisdiction, there was some attempt in its affidavits to how that the judgment of the plaintiffs against Z. E. G. under he decree of December 30, 1929, was collusive because a prior greement had been made with Z. E. G. by the German executors f Sielcken to indemnify it against any recoveries by Sorenson nd Nielsen, as surviving partners of Crossman & Sielcken. In ther words, there seems to be a contention by the government though it was not alluded to in the opinion of the court below r urged on this appeal) that the plaintiffs obtained judgment gainst the funds of Z. E. G. in the hands of the Custodian, knowng that a substantial part of their recovery was to be turned ack to Z. E. G. and that in April, 1930, they repaid to Z. E. G. a ubstantial percentage of the recovery pursuant to this underanding the answer to the government's contention by the Irving Trust Company as executor of Sielcken is (1) that the agreement f indemnity made by Sielcken's German executors was not bindng on the Trust Company as American executor, (2) that the greement was of doubtful validity and (3) that Mr. Rhodes, who represented the government in the trial before Judge Caffey, knew all about the agreement of indemnity and the return to Z. E. G. of part of the recovery.

The claim that Rhodes was not aware of these facts was based on an unverified statement made by the latter to the government attorney Sterck.

The proceeds of the recovery of the plaintiffs were distributed in April, 1930, under an agreement of settlement, made after the entry of the decree by Judge Caffey. At the time of the settlement there were substantial assets of the Sielcken estate in Germany out of which the agreement of indemnity, if held valid by German courts, might have been satisfied, and the settlement was made and carried out some time after the entry of the decree. Therefore, the mere payment to Z. E. G. from the American assets would not show that the judgment recovered against them by the plaintiffs was fraudulent in whole or in part.

Moreover, if a decree is to be set aside, on the ground of fraud, nine years after it was rendered, the remedy would have to be by bill of review, which would only be allowed if the court were

satisfied that the evidence was not available at the time the original suit was litigated and that it was presented without undue delay after discovery. United States v. Throckmorton, 98 U. S. 61; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207; Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 421. In no event would there be any justification for setting aside a decree on affidavits without examination and cross examination of witnesses particularly where the affidavits proved to be contradictory in respect to important issues. It is perhaps unnecessary to reiterate that the trial court only vacated the decree for lack of jurisdiction and that we hold it was precluded from doing this because the same issues were involved in the trial before Judge Caffey.

The order of the court below is reversed and the motion to set aside the decree of December 30, 1929, is denied.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of March, one thousand nine hundred and forty.

Present: Hon. LEARNED HAND, Hon. AUGUSTUS N. HAND, Hon. CHARLES E. CLARK, Circuit Judges.

JOHN S. SORENSON AND THORLEIF S. B. NIELSEN, AS THE SURVIVING PARTNERS OF THE FIRM OF CROSSMAN & SIELCKEN, PLAINTIFFS

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, FRANK WHITE, AS TREASURER OF THE UNITED STATES AND ZENTRAL EINKAUFS GESELLSCHAFT, M. B. H., DEFENDANTS

In Proceedings to vacate Final Decree of December 30, 1929

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, INTERVENOR IN PROCEEDING TO VACATE, APPELLANT, AND RESPONDENT ON CROSS-APPEAL

THE ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, RESPONDENT AND CROSS-APPELLANT

THE UNITED STATES OF AMERICA, RESPONDENT

JOHN S. SORENSON, DEFENDANT-RESPONDENT

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court, dated April 28, 1939, vacating the decree of December 30, 1929 and declaring it void for lack of jurisdiction, be and it hereby is reversed and the original decree reinstated.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS, *Clerk.*

Order for mandate

United States Circuit Court of Appeals, Second Circuit. Filed Mar. 7, 1940. D. E. Roberts, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York.

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 1136, inclusive in 2 volumes, contain a true and complete transcript of the record and proceedings had in said Court, in the case of John S. Sorenson and Thorlief S. B. Nielsen, Plaintiffs, against Howard Sutherland, as Alien Property Custodian, et al., Defendants. Irving Trust Co., as Executors; Attorney General of the United States, Appellants as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this second day of May, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. ROBERTS, *Clerk.*

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Supreme Court of the United States

Order allowing certiorari

Filed June 3, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

ROBERT H. JACKSON, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES, AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Robert H. Jackson, Attorney General of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled case on March 7, 1940.

OPINIONS BELOW

The opinion of the District Court (R. 1074–1092) is reported in 27 F. Supp. 44. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1118–1126) is reported in 109 F. (2d) 714.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 7, 1940 (R. 1126–1127). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether an unappealed judgment against the Alien Property Custodian under Section 9 (a) of the Trading with the Enemy Act, on a claim to recover for a debt, may be set aside for want of jurisdiction on the ground that the beneficial owner of the claim sued on was an "enemy", as defined by that Act.

STATUTES INVOLVED

The pertinent portions of the Trading with the Enemy Act are set forth in the Appendix.

STATEMENT

The firm of Crossman & Sielcken was a partnership having its principal place of business in New York. It consisted of Sorenson, Nielsen, and Sielcken, all citizens of the United States (R. 808). The entire capital of the partnership belonged to Sielcken, and the articles of partnership provided that upon Sielcken's death the surviving partners should pay over to his executor all of the assets of the partnership (R. 807). The interests of Sorenson and Nielsen in the partnership were limited to

12½% each of the net profits (R. 60, 807). Sielcken died in Germany on October 8, 1917, after having resided there continuously since 1914 (R. 814).

The prior suit.—In 1927 Sorenson and Nielsen brought suit against the Alien Property Custodian in the United States District Court for the Southern District of New York under Section 9 (a) of the Trading with the Enemy Act (R. 318). The complaint alleged that a debt was due the partnership of Crossman & Sielcken by Zentral Einkaufs-Gesellschaft, m. b. H. (hereinafter referred to as "Z. E. G."), a German corporation acting as official purchasing agent for the Imperial German Government (R. 319–320). It was alleged that the debt was for certain cargoes consigned by Crossman & Sielcken to Z. E. G. at neutral ports during 1915, which had been seized and condemned by the British. The complaint declared that the Alien Property Custodian had in his possession certain assets of the Z. E. G. (R. 322), and that the recovery of the debt was sought out of those assets (R. 322–323). Sorenson and Nielsen alleged that they brought the suit as surviving partners pursuant to Section 61 of the Partnership Law of New York (R. 322).

Z. E. G. filed an answer alleging that no debt was owing to the partnership, first, because title did not pass until delivery of the cargoes at neutral ports (R. 327) and the cargoes had been seized before arrival at such ports, and second, because the non-

liability of Z. E. G. had been conclusively determined by arbitration in Germany (R. 330). In support of this second defense, Z. E. G. alleged that the partnership of Crossman & Sielcken had been dissolved by the outbreak of the war on April 6, 1917, by reason of the fact that Sielcken was then residing in Germany, and became an enemy (R. 329). The answer alleged that the claim in question thereupon passed to Sielcken, and upon his death to his German executors (R. 329–330). It was averred that the German executors had entered into an arbitration agreement with Z. E. G. (R. 330), and that the arbitrators had found that there was no liability on the part of Z. E. G. in respect of the seized shipments. The Alien Property Custodian answered, adopting the defenses of Z. E. G. and alleging generally that he was without knowledge of the facts alleged (R. 337–341).

The District Court held that the shipments were made pursuant to c. i. f. contracts and that the risk of loss therefore rested with the consignee. It further held that the partnership was not dissolved by the outbreak of war so that the claim against Z. E. G. did not pass to Sielcken before his death, and that his German executors, therefore, had no power to arbitrate the claim (R. 864–866). The District Court accordingly found that Z. E. G. was indebted to the partnership, and entered judgment against the Alien Property Custodian and the Treasurer of the United States in the sum of $716,-

160.37 (R. 352). This judgment was duly paid (R. 1071–1072).

The sole question litigated in the 1929 proceeding was whether any debt was owing from Z. E. G. No issue was made by the pleadings or raised at the trial as to whether the surviving partners were precluded from suing because Section 9 (a) of the Trading with the Enemy Act expressly limited suit to a person "not an enemy," and Sielcken, whose estate would be the sole beneficiary of any recovery, was an "enemy" as defined in the Act.[1] Z. E. G. did contend, in support of the authority of Sielcken's German executors to make a binding arbitration agreement, that Sielcken was an "enemy" under the Trading with the Enemy Act by virtue of his residence in Germany, and was by analogy an enemy within the operation of the common law rule that a partnership is dissolved upon a declaration of war if one of the members thereby becomes an enemy. The District Court, Judge Caffey presiding, held that Sielcken while an enemy as defined in the Act, did not become an enemy within the meaning of the dissolution doctrine, and that the claim therefore did not pass to

[1] Paragraph 2 of the complaint alleged that the *partnership* was neither an enemy nor an ally of an enemy within the meaning of the Act of October 6, 1917 (R. 319). The answer of Z. E. G. (R. 324–325) and of the Alien Property Custodian (R. 338) denied knowledge sufficient to form a belief in this respect.

Sielcken but remained a partnership asset.[2] The question was never mooted and Judge Caffey did not decide whether the court was without jurisdiction of the suit because Sielcken was admittedly

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[2] The discussion of this question at the trial appears at R. 851–857. Judge Caffey, in the course of a colloquy with counsel, said (R. 852–853):

> In this case the partnership agreement was between American citizens; and it is inconceivable to me that there should be a precedent in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country which results *ipso facto* in a dissolution of his partnership. * * *
>
> I do not find anything in the authorities to indicate that war has any such harsh consequences, and it does not follow from the fact that for purposes of administering our own affairs in the way that we see fit, that we provide in such a statute as that, the Trading with the Enemy Act, for the regulation of affairs during the period of the war, and for the purpose of such regulation that we shall in the respects specified in that statute in the administration of the matters dealt with by that statute, treat an American citizen who is in an enemy country, for the purpose of the statute, as an alien enemy.
>
> It does not follow at all from that that he is an alien enemy in the sense that a national of the country with which we are at war is an alien enemy.

In his memorandum opinion, Judge Caffey, after holding that the transaction between Crossman & Sielcken and Z. E. G. was a c. i. f. contract, disposed of the alleged dissolution of the partnership as follows (R. 865):

> I have already indicated to you my view, that under the partnership agreement, the executors of Sielcken in Germany, had not the slightest authority or right to settle or otherwise dispose of a partnership asset which had come into existence long prior to our entering the War, out of these transactions which occurred in 1914.

an "enemy" within the meaning of the Trading with the Enemy Act. Apparently it was assumed by all parties that the court did have jurisdiction.

The present suit. In 1938, the Attorney General of the United States, as successor to the Alien Property Custodian, moved to set aside the 1929 judgment on the ground that the District Court had been without jurisdiction. In support of the motion he pointed out that, in the prior suit, it clearly appeared that the estate of Sielcken was the sole owner of the claim, that Sielcken was an enemy under Section 2 of the Trading with the Enemy Act, and that the suit by Sorenson and Nielsen, as liquidating partners, was merely a suit for the benefit of Sielcken's estate. The Irving Trust Company, the American executor of Sielcken's estate, was permitted to intervene, and numerous documents and affidavits were filed in support of and in opposition to the motion.[3] The motion was

[3] The evidence adduced in support of the motion to set aside the judgment discloses substantial evidence of collusion and possible fraud. Thus it appears that Sorenson and Nielsen had no interest whatsoever in the claim, that they had been paid in full for their interest in the partnership profits; had executed releases to the executor; and had assigned any right thereto to the Irving Trust Company (R. 252–255). It appears that counsel for Sorenson and Nielsen had deliberately refrained from making the trust company, as executor, a party to the suit because he knew that it would be evident to the court that it lacked jurisdiction (R. 217, 218). And it further appears that the plaintiffs received nothing out of the amount awarded (R. 262, 267); that approximately one-half was paid to Z. E. G., the Ger-

heard before Judge Goddard, who concluded that no jurisdiction had existed to enter the 1929 judgment,[4] which he accordingly set aside. On appeal, the Circuit Court of Appeals for the Second Circuit reversed.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the prior judgment was *res judicata* on the question whether the estate of Sielcken was the beneficial owner of the claim sued on, and whether Sielcken was an "enemy" as defined in the Trading with the Enemy Act.

2. In holding that the prior judgment was *res judicata* on these questions even if they were not actually litigated in that suit.

---

man Government corporation which in no circumstances was entitled to recover any part of its property seized by the Alien Property Custodian (R. 223–228); that $50,000 of the amount recovered was paid to a German national, Theodor Wille (R. 223–228); and that the balance was retained by the respondent trust company, which had assented to this distribution (R. 228).

[4] He also said (R. 1088–1089): "It is clear from the foregoing that the controversy involved in the suit in which the plaintiffs obtained the decree which the Government now seeks to vacate, although nominally between the plaintiffs, as alleged nonenemy surviving partners of the firm of Crossman & Sielcken, and the defendants was actually and substantially a controversy between an executor of an enemy jointly interested with an enemy firm and the defendants; furthermore, it appears that Sorenson and Nielsen were collusively made parties plaintiff for the purpose of 'creating a case cognizable' under the Trading with the Enemy Act."

3. In holding that these questions were actually litigated in the prior suit.

4. In reversing the order of the District Judge setting aside the prior judgment.

REASONS FOR GRANTING THE WRIT

1. The original suit was brought under Section 9 (a) of the Trading with the Enemy Act, which provides that a person not an enemy may bring suit in a federal district court against the Alien Property Custodian to recover for a debt owed by an enemy whose property has been seized by the Custodian. Section 2 of the Act defines an enemy as a person of any nationality, resident within the territory of any nation with which the United States is at war. It is settled that a nominal plaintiff cannot maintain a suit under the Act where the real party in interest is an enemy.[5] Petitioner contended below, in support of the motion to set aside the judgment, that the former suit was brought by the individual respondents on behalf of the estate of Sielcken, and that Sielcken was a resident of Germany at the time of his death, and was, therefore, an enemy within the meaning of the Act. The court below held that since these questions, being jurisdictional, were necessarily be-

[5] *Stoehr* v. *Wallace*, 255 U. S. 239; *Schrijver* v. *Sutherland*, 19 F. (2d) 688 (App. D. C.); *Miller* v. *Schutte*, 287 Fed. 604, 607 (App. D. C.). Cf. *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457, 462; *Swiss National Insurance Co.* v. *Miller*, 267 U. S. 42, 44; *Sturchler* v. *Hicks*, 17 F. (2d) 321 (E. D. N. Y.).

fore the district court in the former suit, the judgment in that suit was *res judicata*. The decision is in conflict with the subsequent decision of this Court in *United States* v. *United States Fidelity and Guaranty Co.*, No. 569, this Term, decided March 25, 1940.

The court below relied upon *Stoll* v. *Gottlieb*, 305 U. S. 165, and *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371. In the former case the Court simply announced the ordinary rule that a judgment is *res judicata* as to jurisdictional issues actually raised and litigated. In the latter case the Court held that a judgment is, in some circumstances at least,[6] *res judicata* as to the jurisdiction of the court to entertain the suit, even though the jurisdictional question was not raised. But in that case the jurisdictional question was not whether the United States had consented to be sued. And in *United States* v. *United States Fidelity and Guaranty Co., supra*, the Court held that a judgment on a cross-claim against the United States, entered in the absence of specific statutory consent, was void and subject to collateral attack. The Court said:

> Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial

[6] Compare *Kalb* v. *Feuerstein*, 308 U. S. 433.

power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body. *Chicot County Drainage District* v. *Baxter State Bank* is inapplicable where the issue is the waiver of immunity.

This decision reflects the familiar rule that the representatives of the Government cannot by their silence, or even acquiescence, confer on a court jurisdiction of a suit against the United States, if Congress has withheld consent to suit.[1] And this Court has repeatedly held that a suit against the Alien Property Custodian is, in substance, a suit against the United States to be maintained only as Congress has consented. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 602–603; *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 78; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118.

2. The court below went on to say that the jurisdictional questions, that is the questions as to the residence of Sielcken and as to the interest of respondents in the claim, were not only necessarily present in the original suit but were actually raised and litigated there. And the court apparently assumed that if this was the case the former judgment was unquestionably *res judicata.*

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[1] *Case* v. *Terrell,* 11 Wall. 199, 202; *Carr* v. *United States,* 98 U. S. 433, 435–439; *Stanley* v. *Schwalby,* 162 U. S. 255, 270; *Munro* v. *United States,* 303 U. S. 36, 41; *Minnesota* v. *United States,* 305 U. S. 382, 388–389.

The statement that these issues were actually raised and litigated in the original proceeding is, we think, wholly erroneous. As shown in the Statement, *supra,* pp. 3–7, it was unsuccessfully contended in the former proceeding that because Sielcken was an enemy under the Trading with the Enemy Act the partnership was, by the common law rule, dissolved upon the declaration of war.[8] But the question was not litigated whether, since Sielcken's estate was the real party in interest, the suit was within the statutory consent because Sielcken was an enemy under the statute.[9]

But, in any event, and assuming that these issues were actually litigated in the former proceeding, the decision of the court below that the former judgment is therefore *res judicata* is one of substantial importance which is in conflict with the decision of the Court of Appeals for the District of Columbia in *United States* v. *Ickes,* 84 F. (2d)

---

[8] This contention was made in connection with the question as to the authority of Sielcken's German executors to arbitrate the claim against the Z. E. G.

[9] The sole basis for the statement of the court below that the jurisdictional issue was litigated is the allegation in the partnership's pleadings in the original suit that the *partnership* was not an enemy or ally of an enemy within the meaning of the Trading with the Enemy Act (R. 319). The defendants Z. E. G. and the Alien Property Custodian denied sufficient knowledge to form a belief as to this allegation; thereafter the jurisdictional objection was mentioned neither in the hearings nor in the memorandum of the trial judge (R. 324–325, 338).

257, and is of doubtful correctness under the decisions of this Court.

In the *Ickes* case a suit was instituted to compel the Secretary of the Interior to consider a certain claim and the Secretary answered that the claim had never been presented to him, presentation and rejection being prerequisite to any suit against him under the statute there involved. Later, however, the Secretary consented that a decree be entered against him for the issuance of a writ of mandamus. Thereafter, the Secretary moved to set aside the decree on the ground that the claim in question had never been presented to and considered by him. The Court of Appeals for the District of Columbia held that the former decree was not *res judicata* on that jurisdictional question and, accordingly, set aside the consent decree.

It is unquestionably true that a judgment is ordinarily *res judicata* as between private parties even as to jurisdictional issues, if they were actually raised and litigated. *Stoll* v. *Gottlieb, supra.* But attention has already been called to the principle that the legal representatives of the United States cannot enlarge a statutory consent to suit against it by their failure to object or even by their affirmative acquiescence. And no reason is perceived why the agents of the United States should have any greater power to increase its liability to suit by unsuccessfully urging an ob-

jection and then abandoning it, either expressly as in the *Ickes* case or simply by failing to appeal. In the *United States Fidelity and Guaranty Co.* case, although the jurisdictional issues had not in fact been litigated in the prior proceeding, the Court stated broadly that the failure of officials to seek review could not make a judgment *res judicata* on the question whether the United States had consented to the suit, and that the *Chicot County* case "is inapplicable where the issue is the waiver of immunity."

CONCLUSION

The decision below is incorrect. It decides questions of substantial general importance and is in conflict with a recent decision of this Court and with a decision of the Court of Appeals for the District of Columbia. It is respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MAY, 1940.

APPENDIX

The Trading with the Enemy Act of 1917, c. 106, 40 Stat. 411 (U. S. C. A., Title 50, Appendix) provides in part:

> SEC. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, * * *.
>
> SEC. 7 (c).
>
> * * * * * *
>
> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.
>
> SEC. 9 (a). That any person not an enemy or ally of enemy * * * to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof

shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; * * * if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

SEC. 9 (f). Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

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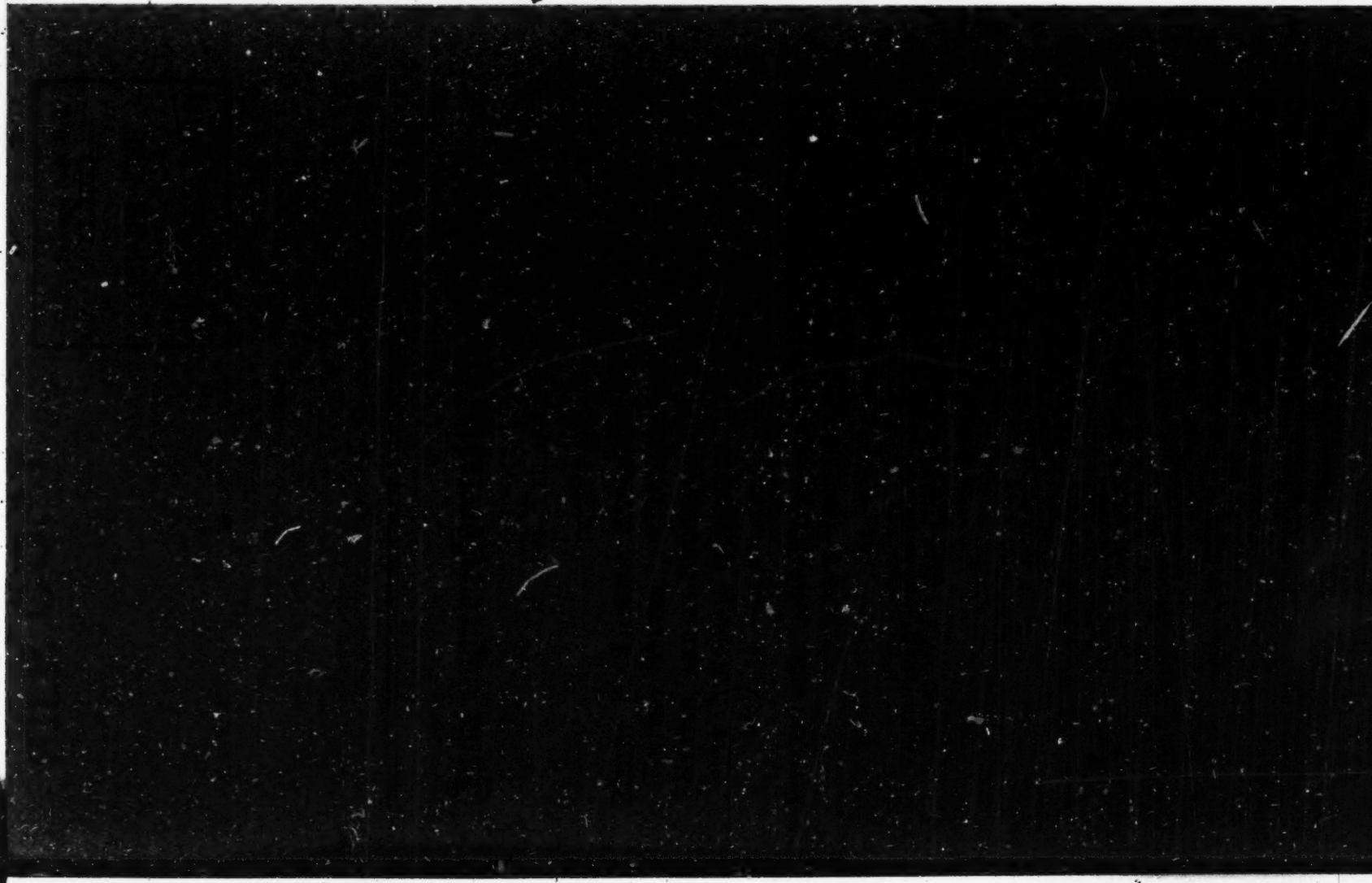

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 75

ROBERT H. JACKSON, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES, AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 1074–1092) is reported in 27 F. Supp. 44. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1118–1126) is reported in 109 F. (2d) 714.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 7, 1940 (R. 1126–1127). The

petition for a writ of certiorari was filed on May 11, 1940, and was granted on June 3, 1940. The jurisdiction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether an unappealed judgment against the Alien Property Custodian under Section 9 (a) of the Trading with the Enemy Act, on a claim to recover for a debt, may be set aside for want of jurisdiction on the ground that the beneficial owner of the claim sued on was an "enemy," as defined by that Act.

STATUTES INVOLVED

The pertinent portions of the Trading with the Enemy Act are set forth in the Appendix, *infra*, pp. 51–53.

STATEMENT

The firm of Crossman & Sielcken was a partnership, engaged in the export business, having its principal place of business in New York. It consisted of Sielcken, Sorenson, and Nielsen, all naturalized citizens of the United States (R. 152, 362, 509, 593, 808). The entire capital of the partnership belonged to Sielcken (R. 60, 806–7), the interests of Sorenson and Nielsen being limited to a percentage of the net profits (R. 60, 806–7). The articles of partnership provided that upon the death of Sielcken "it shall be the duty of the surviving partners to transfer and pay over to the

executor of the will of the deceased partner his capital * * * and also all the property and business of the firm" (R. 62, 807). Sielcken died in Germany on October 8, 1917, after having lived there continuously since 1914 (R. 9, 299, 814). Respondent is the American executor of Sielcken's estate (R. 299–300).

The original action.—In 1927, Sorenson and Nielsen, "as the surviving partners of the firm of Crossman & Sielcken," brought suit against the Alien Property Custodian and the Treasurer of the United States in the United States District Court for the Southern District of New York under Section 9 (a) of the Trading with the Enemy Act (R. 19, 318).[1] The bill of complaint alleged that a debt was due the partnership of Crossman & Sielcken by Zentral Einkaufs-Gesellschaft, m. b. H. (hereinafter referred to as "Z. E. G."), a German corporation acting as official purchasing agent for the Imperial German Government (R. 319–320). It was alleged that the debt was for certain cargoes purchased during 1915 by Crossman & Sielcken for Z. E. G. and its predecessor purchasing agency, and consigned to neutral ports, which had been seized and condemned by the British. The bill declared that the Alien Property Custodian and the Treasurer of the United States

[1] A notice of claim, pursuant to the requirements of Section 9 (a), had previously been filed with the Alien Property Custodian (R. 18, 147) and this the bill alleged (R. 322).

held certain assets of Z. E. G. which had been seized under the provisions of the Trading with the Enemy Act (R. 322), and prayed that these assets be paid to plaintiffs in satisfaction of the debt owing by Z. E. G. to Crossman & Sielcken (R. 322–323). Sorenson and Nielsen alleged that they were the surviving partners of Crossman & Sielcken, which continued, in accordance with Section 61 of the Partnership Law of New York, for the purpose of winding up its affairs, and that the suit was brought pursuant to such purpose (R. 322).

The Alien Property Custodian and the Treasurer of the United States moved to dismiss on the grounds that it appeared on the face of the bill (a) that no debt was owing to the plaintiffs from any enemy whose property had been seized and was being held, (b) that no debt was owing by Z. E. G., and (c) that the plaintiffs had not stated facts sufficient to entitle them to equitable relief under the Trading with the Enemy Act (R. 337–338). These defendants also filed an answer which for the most part denied any knowledge as to the material averments concerning the transactions alleged to have given rise to the debt (R. 338–339), and set up as an affirmative defense prior claims to the seized funds of Z. E. G. (R. 340–341).

Z. E. G., which was joined as a defendant, filed an answer denying certain material averments of the claim and setting up nine affirmative defenses.

The first four alleged that the cargoes had been seized prior to arrival at the neutral ports to which they had been consigned, and that no debt was owing because title did not pass and payment was not to be made until the goods were received (R. 326–328). The sixth and seventh defenses averred that the non-liability of Z. E. G. had been conclusively determined by arbitration in Germany (R. 329–330). In support of this defense, Z. E. G. alleged that the partnership of Crossman & Sielcken had been dissolved by the outbreak of the war on April 6, 1917 by reason of the fact that Sielcken was then residing in Germany, and became an enemy. It was alleged that the claim thereupon passed to Sielcken and upon his death to his German executors, who entered into an arbitration agreement with Z. E. G.; and that the arbitrators had found that there was no liability on the part of Z. E. G. in respect of the seized shipments. The other affirmative defenses are not material here.[2]

After a trial in which the main burden of defense was borne by counsel for Z. E. G. (R. 393, 804,

[2] The fifth defense asserted that the plaintiffs did not have title to the alleged cause of action since the Alien Property Custodian was alleged to have seized all the assets of Crossman & Sielcken in October 1917, because Sielcken was an enemy (R. 328–329). This defense was never mentioned at the hearing or in the opinion of the District Court. The eighth and ninth affirmative defenses averred that another firm had had a half interest in the shipments (R. 331–332). At the trial, counsel for Z. E. G. indicated his disinclination to press these defenses (R. 801).

1004, 1006, 1022–3), the District Court held that the risk of loss of the cargoes rested with Z. E. G. and its predecessor (R. 865). It further held that the partnership was not dissolved by the outbreak of war, so that the claim against Z. E. G. did not pass to Sielcken before his death and his German executors had no power to submit the claim to arbitration (R. 852–854, 865). The court ruled that, even though Sielcken was an "enemy" under the Trading with the Enemy Act, he did not thereby become an enemy under the common law doctrine that a partnership with an enemy is dissolved by the outbreak of war (R. 852–853, 855–856). Accordingly it found that Z. E. G. was indebted to the plaintiffs, and entered judgment against the Alien Property Custodian and the Treasurer of the United States in the sum of $716,160.37 (R. 351–352). This judgment was duly paid (R. 1071–1072).[3]

As will be fully demonstrated in the argument, the sole question actually litigated in the 1929 proceeding was whether any debt was owing from Z. E. G. No issue was raised at the trial, and no determination was made by the District Court, as to

[3] In a separate action in the Supreme Court of the State of New York, to which the Government was not a party, it was determined, in 1933, that respondent, Sielcken's American executor, had the sole right to liquidate the partnership, that neither Sorenson nor Nielsen had been a liquidating partner, and that neither was entitled to any part of the proceeds of the recovery from the Alien Property Custodian (R. 35–37, 238–251, 263–264).

whether the court was without jurisdiction of the suit because Section 9 (a) of the Trading with the Enemy Act expressly limited the right to sue to a person "not an enemy" and Sielcken, whose estate would be the sole beneficiary of any recovery, was an "enemy" as defined in the Act.

The present motion.—In 1938, the United States moved to set aside the 1929 judgment on the ground that the District Court had been without jurisdiction. The Attorney General of the United States, as successor to the Alien Property Custodian, subsequently appeared as moving party in behalf of the United States. In support of the motion it was pointed out that the estate of Sielcken was the sole beneficial owner of the claim, that Sielcken was an enemy under Section 2 of the Trading with the Enemy Act, and that the suit by Sorenson and Nielsen, as liquidating partners, was merely a suit for the benefit of Sielcken's estate. The Irving Trust Company, the American executor of Sielcken's estate, was permitted to intervene, and numerous documents and affidavits were filed in support of and in opposition to the motion.[4] The

[4] These affidavits and documents disclose substantial evidence of collusion and possibly of fraud. Thus it appears that neither Sorenson nor Neilsen had any pecuniary interest whatsoever in the claim (R. 252–255, 238–251); that they had been paid in full for their interest in the partnership profits, had executed releases to the executor, and had agreed to turn over any monies recovered on account of the claim to the executor (R. 252–255). Counsel for the plaintiffs in the original suit was apparently retained by Siel-

motion was heard before Judge Goddard, who concluded that no jurisdiction had existed to enter the 1929 judgment, which he accordingly set aside (R. 1103–1106).[5] On appeal, the Circuit Court of

cken's widow, sole distributee of his estate (R. 37, 38, 160–168, 307, 361–408, 515) with the authorization of the executor (R. 167, 168, 307); and it appears probable that counsel deliberately refrained from making the trust company, as executor, a party to the suit because he felt that this would make the court's lack of jurisdiction apparent (R. 20–21, 217–218). It was judicially determined, in 1933, that Sorenson and Nielsen did not have standing to sue to collect debts owing to Crossman & Sielcken (R. 238–251, 263). It further appears that the plaintiffs received nothing out of the amount awarded (R. 262, 273–4, 279); that approximately one-half was paid to Z. E. G., the German government corporation which in no circumstances was entitled to recover any part of its property seized by the Alien Property Custodian (R. 223–237, 924), and that this settlement was possibly the result of a pre-trial understanding between plaintiff's counsel and Z. E. G. (R. 34–35, 192–4); that $50,000 of the amount recovered was paid to a German firm, Theodor Wille (R. 39–40, 223–237, 924), which had had either a half interest in the seized cargoes or some other agreement to share profits and losses on the transaction (R. 11–12, 220, 868–870, 1030–31), and that the balance was retained by the respondent trust company, as executor, which had assented to this distribution (R. 228, 307, 924).

[5] Judge Goddard also found that the 1929 judgment had been obtained by fraud. He stated in part in his opinion (R. 1088–1089): "It is clear from the foregoing that the controversy involved in the suit in which the plaintiffs obtained the decree which the Government now seeks to vacate, although nominally between the plaintiffs, as alleged nonenemy surviving partners of the firm of Crossman & Sielcken, and the defendants was actually and substantially a controversy between an executor of an enemy jointly interested with an enemy firm and the defendants;

Appeals for the Second Circuit reversed on the ground that the 1929 judgment was conclusive and that the issue of jurisdiction was *res judicata* (R. 1118–1127).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the 1929 judgment was *res judicata* on the question whether the estate of Sielcken was the beneficial owner of the claim sued on, and whether Sielcken was an "enemy" as defined in the Trading with the Enemy Act.

2. In holding that the 1929 judgment was *res judicata* on these questions even if they were not actually litigated in that proceeding.

3. In holding that these questions were actually litigated in the original proceeding.

4. In reversing the order of the District Court setting aside the 1929 judgment.

SUMMARY OF ARGUMENT

1. A suit under Section 9 (a) of the Trading with the Enemy Act is a suit against the United States; the district court has jurisdiction over such a suit only to the extent to which the United States has consented to be sued. One of the con-

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furthermore, it appears that Sorenson and Nielsen were collusively made parties plaintiff for the purpose of 'creating a case cognizable' under the Trading with the Enemy Act."

The court below held that the finding of fraud was not ground for vacating the judgment because the proper procedure in the case of fraud was to move by bill of review rather than by motion to vacate. This holding of the court below is not now before this Court for review.

ditions upon which the consent of the United States has been given to suit against it under the Act is that the action be brought by one who is not an "enemy." This condition was plainly not met in the original action.

At the time that action was commenced, all the assets of the partnership of Crossman & Sielcken, including the claim sued on, had passed, pursuant to the partnership agreement, to the estate of Sielcken, and neither Sorenson nor Nielsen had any personal interest in the recovery. It is clear, therefore, that the action was brought on behalf of Sielcken's estate. The status of the estate was that of an enemy. Judge Goddard found, and the record permits no other conclusion, that at the time of his death Sielcken was an "enemy" within the meaning of the Trading with the Enemy Act. The status of Sielcken's estate is, of course, the same as that of Sielcken; Sielcken's legal representative can have no greater rights than Sielcken would have had himself if living. Since the status of Sielcken's estate was that of an enemy and since the estate not only owned the debt claim but was the sole party interested in the recovery, it is perfectly apparent that the suit against the Custodian on the claim was not one authorized by Section 9 (a).

It could not be contended that the court would have had jurisdiction if the suit had been brought by the executor of Sielcken's estate, as should have been done. The result is not changed because, in an

attempt to conceal the jurisdictional defect, the partnership was interposed as nominal plaintiff. Under the Act a partnership is not a separate legal entity distinct from its members. By the express provisions of Section 2, a suit by a partnership is a suit by a "body of individuals" and, if one of the members be an enemy, is a suit by an enemy to the extent of such member's interest. If the action had been brought during Sielcken's life it would therefore have been an enemy claim to the extent of his interest. It was equally an enemy claim after his death to the full extent of the interest of his estate in the partnership assets.

The requirement of nonenemy status prescribed by Section 9 (a) is expressly made a limitation on the right to sue. This requirement not having been satisfied, the suit was one against the United States which the United States had not authorized and over which, therefore, the District Court had no jurisdiction.

2. Since the original proceeding was an unauthorized suit against the United States and since, therefore, the District Court had no power to exercise jurisdiction in the case, the judgment which it entered was void and it was properly vacated on the present motion. *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506.

The opposite conclusion reached by the court below was based on the premise that the jurisdictional issue was adjudicated in the original action

and that therefore the judgment entered was beyond attack, even though the court which entered it was entirely without jurisdiction. This conclusion was thought to be required by the decision in *Stoll* v. *Gottlieb*, 305 U. S. 165. The court below further held that the 1929 judgment was beyond attack even if the jurisdictional issue was not adjudicated in the original action. This ruling was thought to be required by the decision in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371. Since the court below decided the present case, this Court has held that a judgment rendered against the United States without its consent is "void" and that such a judgment is not *res judicata* of the jurisdiction of the court in which it was rendered, at least where the jurisdictional issue was not adjudicated in the original suit. *United States* v. *U. S. Fidelity & Guaranty Co.*, *supra*. It is the Government's position that the present case falls directly within the rule of the *Fidelity & Guaranty Co.* case.

Examination of the record establishes beyond question, as Judge Goddard expressly found, that the jurisdictional issue of whether the suit was brought on behalf of an enemy was not contested or adjudicated in the original proceeding. This being so, the judgment entered in that proceeding could not be *res judicata* of the jurisdictional issue on the present motion to vacate. Although in some situations *res judicata* may be pleaded as a bar not

only with respect to jurisdictional matters actually contested but also with respect to jurisdictional matters which might have been contested (see *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 378), this rule is entirely inapplicable where the issue is the waiver of sovereign immunity. *United States* v. *U. S. Fidelity & Guaranty Co., supra.*

Moreover, even if it be held that the jurisdictional issue was adjudicated in the original proceeding, the judgment entered in that proceeding was properly vacated on the present motion. The doctrine of *res judicata* is not one of mechanical application and other and competing policies may sometimes be entitled to overriding consideration. Here the private interest in the finality of litigation must, we believe, yield to the public policy which forbids suits against the United States without its consent. This policy is peculiarly strong in the case of the Trading with the Enemy Act. Under that Act, as amended, seized property which was not returnable or subject to a debt claim under Section 9 (a) was held by the United States as a means of securing satisfaction of American claims from the German government. The public interest in strengthening the position of the United States in obtaining from a foreign power a just settlement of American claims is superior, we submit, to any private interest in the finality of litigation.

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Moreover, a motion to vacate is not a collateral attack but a method of direct review to which the doctrine of *res judicata* is not applicable. The decree rendered by Judge Goddard in the present case was simply an exercise by the District Court of its plenary power to vacate its own judgments at any time for want of jurisdiction.

ARGUMENT

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO RENDER THE CHALLENGED JUDGMENT

A suit under Section 9 (a) of the Trading with the Enemy Act is a suit against the United States; the district court has jurisdiction over such a suit only to the extent to which the United States has consented to be sued. One of the conditions upon which the consent of the United States has been given to suit against it under the Act is that the action be brought by one who is not an "enemy." In the view of the Government, this condition was plainly not met in the original proceeding and the suit, therefore, was one to which the United States had not consented. It follows both that the District Court had no power to enter the judgment which it rendered in 1929, and, as we demonstrate in Point II, that that judgment was properly vacated on the present motion.

A. THE ORIGINAL ACTION WAS NOT AUTHORIZED BY SECTION 9 (a) OF THE TRADING WITH THE ENEMY ACT

Section 9 (a) authorizes suits against the Alien Property Custodian only by a person who is "not an enemy or ally of enemy". Section 2 defines "enemy" to include any person who is "resident within the territory * * * of any nation with which the United States is at war, or resident outside the United States and doing business within such territory".

Under these sections, it is plain that the original action was an unauthorized suit against the United States because it was prosecuted solely on behalf and for the benefit of the estate of Sielcken[6] and Sielcken had the status of an enemy. At the time at which the debt to Crossman & Sielcken arose, the entire capital of the partnership belonged to Sielcken; the interest of Sorenson and Nielsen together was merely in 25 percent of the net profits of the business (R. 59–60, 806–807). The partnership dissolved in 1917, if not upon the declaration of war on April 6 (see *Sutherland* v. *Mayer*, 271 U. S.

[6] The record indicates that, in addition to Sielcken's estate, Z. E. G., the German government corporation, and the German firm of Theodore Wille also had an interest in the recovery. See footnote 4, pages 7–8, *supra*. Both Z. E. G. and Theodor Wille were, of course, enemies. However, since the Government is not urging in this Court as ground for reversal that Z. E. G. and Theodor Wille had an interest in the claim, the case will be discussed as though Sielcken's executor had made no agreement with them to share the proceeds of recovery.

272, 286), then upon Sielcken's death on October 8.[7] After Sielcken's death, all the capital, property, and business of the firm, including as an asset the debt here involved, belonged "entirely and absolutely" to his estate pursuant to the terms of the partnership agreement (R. 59–60).[8] Consequently, when the action was commenced against the Custodian in 1927 neither Sorenson, Nielsen, nor the firm of Crossman & Sielcken had any interest in the claim (R. 262–264); any amount recovered was solely for the benefit of Sielcken's estate.[9]

The status of Sielcken's estate was that of an enemy. Judge Goddard found, and the record permits no other conclusion, that Sielcken resided in Germany from 1914 until his death in October

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[7] The partnership agreement expressly provided that the "partnership shall continue until terminated by the death of one of the partners" (R. 60).

[8] The agreement of copartnership provided, *inter alia*, that upon the termination of the partnership from whatever cause, the whole of the capital should belong absolutely to Sielcken or his estate and the other partners were to have no share or title to any of it (R. 59–60). The agreement also provided that upon the death of Sielcken, the surviving partners should transfer and pay over to his executor all of Sielcken's capital and all the property and business of the firm (R. 62).

[9] Aside from the fact that ownership of the claim had passed to Sielcken or his estate under the partnership agreement, both Sorenson and Nielsen had executed releases in which, among other things, they agreed that they would turn over to the executor of Sielcken's estate any amounts they might receive on account of the claim here in issue (R. 252–255, 238–245).

1917, and that he was, therefore, an "enemy" within the definition of Section 2 of the Act. The record further shows that he regarded Germany as his domicile,[10] that he sought German naturalization in 1914 (R. 371, 909–910),[11] and that his loyalty was to Germany rather than to the United States (R. 1037, 910–916, 930). The status of the estate is, of course, the same as that of Sielcken; Sielcken's legal representative can have no greater rights than Sielcken would have had himself, if living. See Section 9 (d) of the Act; *Miller* v. *Schutte*, 287 Fed. 604, 607–608 (App. D. C.).

Since the status of Sielcken's estate was that of an enemy and since the estate not only owned the debt claim but was the sole party interested in the recovery, it is perfectly apparent that the suit against the Custodian on the claim was not one authorized by Section 9 (a). Certainly none would contend that the court would have had jurisdiction if the suit had been brought by the executor of Sielcken's estate, as should have been done (see pp. 23–24, *infra*). The result is not changed be-

[10] Sielcken's American will (R. 64–70) describes Sielcken as "of Baden-Baden, Germany," calls Germany his "domicile," makes bequests solely to German persons and institutions, provides for the liquidation of his American estate and its transmission to Germany, and evidently regards his home in Baden-Baden as his real home.

[11] Sielcken apparently failed to complete his expatriation solely because of a belief on the part of the German authorities that he would be more useful as an American citizen (R. 910).

cause, in an attempt to conceal the jurisdictional defect, the partnership was interposed as nominal plaintiff.

The suit was brought in the name of Sorenson and Nielsen "as the surviving partners of the firm of Crossman & Sielcken" (R. 1, 38), and the complaint alleged in paragraph second that the partnership was a resident of the State of New York and that it was at no time an enemy or ally of enemy within the meaning of the Act (R. 319). Respondent contends that these allegations were true and that they were sufficient to satisfy the nonenemy requirements of Section 9 (a). The contention is, in effect, that, even though at the time of suit all the assets of the partnership, including the debt here involved, belonged to Sielcken's estate and the estate was the sole party interested in the recovery, the partnership is nevertheless to be considered as the claimant and its status as an enemy or nonenemy is to be determined entirely without regard to the status of the estate. The Act, of course, permits of no such obvious evasion of its nonenemy requirement.

The principal fallacy underlying respondent's position is its fundamental assumption that, for purposes of the Act, a partnership may be treated as a separate entity, enjoying a status separate and distinct from the status of its members. The short answer is that, under the Act, a partnership is merely a body of individuals. A claim by a part-

nership, therefore, is a claim by its individual members and, if one of the members be an enemy, is a claim by an enemy, at least to the extent of that member's partnership interest. Cf. *Froelich & Kuttner* v. *Sutherland*, 22 F. (2d) 870 (App. D. C.); *Rossmoore* v. *Commissioner*, 76 F. (2d) 520, 521 (C. C. A. 2d); Mechem, *Elements of the Law of Partnership* (2d ed.), Secs. 6–8. Any other rule would be nugatory of the policy of the Act, since it would allow recovery by a partnership doing business in the United States even though all the partners, to whom the benefit of recovery would inure, had the status of enemies.

This conclusion is fortified by the definition of "enemy" contained in Section 2. This section provides that the word "enemy" shall be deemed to mean—

> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

It is to be noted that under the provisions of this section, a partnership is grouped with an "indi-

vidual" and "*other* body of individuals."[12] Under the express terms of the Act, therefore, a claim filed by a "partnership" is a claim of a "body of individuals." The statutory definition sharply distinguishes between such a "body of individuals" and a "corporation." Corporate enemies were separately defined for the avowed purpose of treating corporations as separate legal entities, the Congress having concluded that a disregard of the corporate entity would involve grave administrative difficulties. *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457, 462. It cannot seriously be suggested that Congress intended comparably to endow any "body of individuals" with a legal personality separate and distinct from that of its members. None of the administrative difficulties which prompted the separate treatment of corporations justify or require a like distinction between an association and its members. In the actual administration of the Act, the Alien Property Custodian always treated partnership assets as the property of the individual members for all purposes, including seizure, and this practice was consistently sustained in the courts. *Froelich & Kuttner* v. *Sutherland,* 22 F. (2d) 870 (App. D. C.); cf. *Waldes* v. *Basch,* 109 N. Y. Misc. 306, affirmed without opinion, 191 N. Y. App. Div. 904; *Rossie* v. *Garvan,* 274 Fed.

[12] Similarly, Section 2 defines the word "person" as meaning "an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."

447 (D. Conn.); *Schutte* v. *Miller*, 4 F. (2d) 288 (App. D. C.); *Mayer* v. *Garvan*, 278 Fed. 27 (C. C. A. 1st).

Indeed, under the express terms of Section 2, which makes "residence" a test of status, the Act could not have been administered on any other basis. A "partnership" or "other body of individuals" can be considered "resident" only where it does business or where its members reside. As used in Section 2, "residence" clearly does not mean the place of doing business since the section clearly differentiates between "residence" and "doing business"; for purposes of this section, therefore, the residence of the partnership must be the residence of the partners. This construction of the statute accords with the law of New York, which is to the effect that a partnership has no residence distinct from the residences of the partners. *Bulkley* v. *O'Donnell*, 148 Misc. 186, 265 N. Y. Supp. 495.

It is clear, therefore, that to the extent of the interest of Sielcken, the claim of the partnership was the claim of an enemy. And since the claim was originally one of an enemy, it remained so after Sielcken's interest passed to his estate. It is, of course, immaterial that at the time of the institution of the suit, Sorenson and Nielsen were the sole surviving partners and that they were non-enemies. A claim by a partnership is a claim by its members and upon the death of any member is

a claim by the decedent's estate to the extent of its interest under the partnership agreement. Whether or not Sielcken's estate was technically a "member" of the partnership in liquidation, it owned all the partnership assets "entirely and absolutely" and the authority of the surviving partners, if any, was limited to the power to collect the claim on behalf of the estate.

The conclusion is the same even though it be assumed that a partnership is a separate legal entity under the Act. As we have pointed out, the partnership was dissolved in 1917 and the right to sue was, therefore, dependent on the status of the individual members or their estates. This is shown, for example, by the fact that, after dissolution, a nonenemy partner of an enemy partnership had a right to recover from the Custodian his share of the seized partnership assets. *Mayer* v. *Garvan,* 278 Fed. 27 (C. C. A. 1st); see *Sutherland* v. *Mayer,* 271 U. S. 272, 285. The claim was not that of a nonenemy simply because those purporting to act as liquidating agents for the partnership, after dissolution, were nonenemies. The controlling factor after dissolution was the status of the individuals or their estates for whom, and not the status of those by whom, the partnership was being liquidated. Like Sielcken's executor, the surviving partners were merely trustees for the estate (*Joseph* v. *Herzig,* 198 N. Y. 456, 462; *Losch* v. *Marcin,* 251 N. Y. 402, 410; *Bauchle* v. *Smylie,* 104

N. Y. App. Div. 513, 515); their right to sue under the Trading with the Enemy Act, therefore, like that of the executor, necessarily depended upon Sielcken's status.

Indeed, it seems plain that Sorenson and Nielsen, as surviving partners of the firm, were not even proper parties plaintiff in the suit against the Custodian, and that, as the District Court found (R. 1089), they were collusively made parties plaintiff for the sole purpose of making it appear that the court had jurisdiction of the case.[13] After the dissolution of the partnership in 1917 all of the assets of the firm, including the debt here involved, belonged to Sielcken's estate. The suit against the Custodian should, therefore, have been brought by the American executor of the estate. That estate clearly had the status of an enemy. Certainly jurisdiction of a suit, not authorized by Congress, cannot be conferred on the court by

[13] Section 9 (a) requires that notice of the claim be filed with the Alien Property Custodian "under oath and in such form and containing such particulars as the said custodian shall require". Pursuant to this direction, the Custodian required each claimant under Section 9 (a) to state, under oath, that he was entitled to the payment sought under the Act, that no other person had any interest in or lien upon the proceeds of the claim set forth in the notice, and that the notice was not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the Act. Sorenson and Nielsen filed such a statement before commencing suit (R. 147–154, 152), and so alleged in their bill of complaint (R. 322).

bringing the suit improperly in the name of non-enemies having no interest in the claim sued on."[14]

B. SINCE THE ORIGINAL ACTION WAS NOT AUTHORIZED BY SECTION 9 (a), IT WAS A SUIT AGAINST THE UNITED STATES OVER WHICH THE DISTRICT COURT HAD NO JURISDICTION

As we have stated above, a suit against the Alien Property Custodian is a suit against the United States. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 602–603; *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 78; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118. Consequently, the district court has jurisdiction only if and to the extent that the suit is authorized by the Trading with the Enemy Act. "Consent alone," this Court has held, "gives

[14] The attempted justification for the procedure followed is Sections 61 and 68 of the New York Partnership Law. Section 61 provides that a partnership is not terminated on dissolution but continues until the winding up of partnership affairs is completed; Section 68 provides that "unless otherwise agreed," the surviving partners have the right to wind up the partnership affairs. The fallacy underlying respondent's reliance upon these provisions is that maintenance of the suit against the Custodian was in no way connected with winding up the partnership affairs. Under the partnership agreement, all assets of the firm, including the claim against the Custodian, belonged to Sielcken or his estate upon dissolution of the partnership; after the dissolution in 1917, collection of the claim was the concern of Sielcken or his executor and was not the concern of the partnership. Indeed, in a suit in the New York courts, to which the Government was not a party, it was definitely determined in 1933 that Sielcken's American executor had the sole right to liquidate the partnership and that neither Sorenson nor Nielsen had been a liquidating partner (R. 35–37, 238–251, 263–264).

jurisdiction to adjudge against a sovereign." *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506, 514. And the conditions of such consent, whether in regard to parties (*Austin* v. *United States*, 155 U. S. 417, 433; *Johnson* v. *United States*, 160 U. S. 546, 549), the subject matter of the action (*Bonner* v. *United States*, 9 Wall. 156; *Hill* v. *United States*, 149 U. S. 593; *Bigby* v. *United States*, 188 U. S. 400), the character or amount of relief (*United States* v. *Jones*, 131 U. S. 1; *Nortz* v. *United States*, 294 U. S. 317, 327; *Franklin* v. *United States*, 308 U. S. 516; *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363, 369 (C. C. A. 9th)), or the time within which the action must be instituted (*Finn* v. *United States*, 123 U. S. 277, 232–233; *United States* v. *Wardwell*, 172 U. S. 48, 52; *United States* v. *Seminole Nation*, 299 U. S. 417, 421–422; *Davis* v. *L. S. Cohen & Co.*, 268 U. S. 638, 642; *Munro* v. *United States*, 303 U. S. 36, 40–41; *Compagnie Generale Transatlantique* v. *United States*, 51 F. (2d) 1053, 1056 (C. C. A. 2d)),[15] are jurisdictional limitations no less than the requirement of consent itself.

Under the same principle, the requirement of nonenemy status, prescribed by Section 9 (a), which is expressly made a limitation on the right to sue, is jurisdictional in nature. Judge Goddard so

[15] The question whether the defense of the statute of limitations in a suit brought under the Trading with the Enemy Act is jurisdictional was left open in *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 82.

held, the court below so assumed, and such has been the uniform ruling in other courts. *Garvin* v. *Kogler*, 272 Fed. 442 (C. C. A. 3d); *Thorsch* v. *Miller*, 5 F. (2d) 118 (App. D. C.), appeal dismissed, 274 U. S. 763; *Cummings* v. *Isenberg*, 89 F. (2d) 489 (App. D. C.), certiorari denied, 301 U. S. 682. Indeed, the doctrine that conditions upon the consent of the United States are of the same jurisdictional character as the requirement of consent itself, is peculiarly applicable here, where the condition concerns the personal qualifications of the claimant in his relationship to the Government; such a condition goes not to the technical requirements of procedure but to the willingness of the Government to permit any recovery at all.[16] This condition not having been met, the suit was plainly one against the United States which the United States had not authorized and over which, therefore, the District Court had no jurisdiction.

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[16] Such conditions have always been recognized as jurisdictional. Thus loyalty during the Civil War was made a prerequisite to the maintenance of an action with respect to certain Civil War claims and declared to be a jurisdictional fact. Judicial Code, Sec. 184, U. S. C., Title 28, Section 290. And this Court held that the requirement of loyalty in a special Act dealing with Civil War claims was jurisdictional even in the absence of an express provision to that effect. *Austin* v. *United States*, 155 U. S. 417, 433. Similarly, under the Act of March 3, 1891 (c. 538, 26 Stat. 851), vesting jurisdiction in the Court of Claims to determine "All claims for property of citizens of the United States taken or destroyed by Indians", this Court held that citizenship was a condition of jurisdiction. *Johnson* v. *United States*, 160 U. S. 546; *Contzen* v. *United States*, 179 U. S. 191.

II

The Judgment Entered in the Original Action Was Properly Vacated on the Present Motion

Since the original proceeding was an unauthorized suit against the United States and since, therefore, the District Court had no power to exercise jurisdiction in the case, it seems clear that the judgment which it entered was void and that it was properly vacated on the present motion. *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506.

The opposite conclusion reached by the court below was based on the premise that the jurisdictional issue was adjudicated in the original action and that therefore the judgment entered was beyond attack, even though the court which entered it was entirely without jurisdiction. This conclusion was thought to be required by the decision in *Stoll* v. *Gottlieb*, 305 U. S. 165. The court below further held that the 1929 judgment was beyond attack even if the jurisdictional issue was not adjudicated in the original action. This ruling was thought to be required by the decision in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371.

Since the court below decided the present case, this Court has held that a judgment rendered against the United States without its consent is "void" and that such a judgment is not *res judicata* of the jurisdiction of the court in which it was

rendered, at least where the jurisdictional issue was not adjudicated in the original suit. *United States* v. *U. S. Fidelity & Guaranty Co., supra.* It is the Government's position in the present case that the jurisdictional question was not adjudicated in the 1929 proceeding and that the case is therefore directly within the principle of the *Fidelity & Guaranty Co.* decision. The Government further contends that even if the issue had been adjudicated by Judge Caffey, the 1929 judgment would still not be a bar to reconsideration of the question on the present motion to vacate.

A. THE JURISDICTIONAL ISSUE WAS NOT ADJUDICATED IN THE ORIGINAL PROCEEDING

The pleadings in the original proceeding appear at R. 318–350; the stenographer's minutes of the 1929 trial appear at R. 788–866. Examination of these portions of the record establishes beyond question, as Judge Goddard expressly found (R. 1089–1090), that the jurisdictional question of whether the suit was brought on behalf of an enemy was not contested or adjudicated in the original proceeding.

At the trial the defendants claimed that Sielcken was a resident of Germany at the time of the war, that he owned all the capital of the partnership, and that upon his death it was the duty of the surviving partners to pay over to his executor the capital, property, and business of the firm (R. 807). But it was never even remotely suggested that these

facts raised a jurisdictional issue. Sielcken's residence and interest in the partnership were relied upon solely to show that Z. E. G. was not indebted to the partnership. The argument of both Z. E. G. and of the Government was that, despite Sielcken's American citizenship, his German residence made him an enemy within the common-law doctrine that a partnership between citizens and an enemy is dissolved at the outbreak of war (see *Sutherland* v. *Mayer,* 271 U. S. 272, 286); that, therefore, after the outbreak of war, the partnership was dissolved, the debt belonged to Sielcken and his executors were consequently empowered to collect the debt from Z. E. G. and to submit the claim to arbitration. In support of this contention it was argued that because Sielcken was an "enemy" as defined in the Trading with the Enemy Act by reason of his residence in Germany, he was by analogy an enemy within the common-law dissolution doctrine. Every reference by counsel to Sielcken's enemy status was made in this connection; Section 2 of the Trading with the Enemy Act was used only to provide a persuasive analogy (R. 797, 809, 814, 852–857).

Judge Caffey rejected this argument. He held that, while Sielcken may have been an "enemy" as defined in the Act, he did not become an enemy within the meaning of the dissolution doctrine, at least so far as transactions occurring prior to the war were concerned. The distinction in the

court's view between the Act and the common-law doctrine was clearly indicated and the court expressly concluded that the provisions of the Act defining "enemy" were in no way involve .[17]

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[17] The main discussion of the question at the trial appears at R. 851–857. Judge Caffey, in the course of a colloquy with counsel, said (R. 852–853):

"The proposition there is whether or not where there is an existing agreement between nationals of two countries who later go to war, as a result of the war that there is a dissolution of the partnership agreement.

"In this case the partnership agreement was between American citizens; and it is inconceivable to me that there should be a precedent in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country which results *ipso facto* in a dissolution of his partnership.

"I do not believe that it even results in a suspension during the period of the war, in a suspension of the partnership. It is very certain in my mind that it cannot affect the rights of the parties into ceasing with respect to a transaction which occurred long prior to the war.

"I do not find anything in the authorities to indicate that war has any such harsh consequences, and it does not follow from the fact that for purposes of administering our own affairs in the way that we see fit, that we provided in such a statute as that, the Trading with the Enemy Act, for the regulation of affairs during the period of the war, and for the purpose of such regulation that we shall in the respects specified in that statute in the administration of the matters dealt with by that statute, treat an American citizen who is in an enemy country, for the purpose of the statute, as an alien enemy.

"It does not follow at all from that that he is an alien enemy in the sense that a national of the country with which we are at war is an alien enemy."

And again at R. 855–856:

"The COURT. That is entirely true, so far as any current transactions or communications between them are concerned,

The jurisdictional question was not adverted to in the opinion or the judgment. The court's determination that the defendant Z. E. G. "is indebted to the plaintiffs" (R. 351), pointed to by respondent, was obviously only a determination that Z. E. G. was indebted to the partnership.

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but insofar as concerns transactions occurring long prior to the war—and that is what we are concerned with here—I am going to hold that it certainly follows that the German executives [*sic*] of Sielcken had no authority to deal with that prior transaction so as to determine, as between the German Government or of this organization acting for the German account that you referred to, to be adjudicated or passed upon in any such proceeding.

"Mr. RHODES. As I understand your Honor, you do not rule that the partnership was not dissolved.

"The COURT. It may have been suspended for the purposes of the Trading with the Enemy Act. You may call it dissolved. I do not care what you call it.

"I am trying to draw distinction between the necessary consequence of the war *and the provisions of the Trading with the Enemy Act, because we are not concerned with the provisions of the Trading with the Enemy Act here in that regard.* [Italics supplied.]

"Mr. RHODES. I gleaned the impression that you thought there was a distinction between an American citizen residing in Germany and a German citizen.

"The COURT. There is a vital distinction. It is a governing distinction."

In his memorandum opinion, Judge Caffey disposed of the alleged dissolution of the partnership as follows (R. 865):

"I have already indicated to you my view, that under the partnership agreement, the executors of Sielcken in Germany, had not the slightest authority or right to settle or otherwise dispose of a partnership asset which had come into existence long prior to our entering the War, out of these transactions which occurred in 1914."

The court below disagreed with and therefore disregarded Judge Goddard's finding that the jurisdictional issue had not been decided by Judge Caffey in the original proceeding; it reached the opposite conclusion based solely on its interpretation of the first two paragraphs of the bill of complaint. In relying exclusively upon the allegations of the bill, the court below, we believe, committed fundamental error since, in the circumstances of this case, the pleadings are not material. The pleadings may disclose the issues which could have been or were necessarily decided. This Court has held, however, that a judgment is not *res judicata* of the issue of consent to sue unless, at least, there has been an actual adjudication of the question, even though the issue is necessarily involved. *United States* v. *U. S. Fidelity & Guaranty Co., supra.* The pleadings may sometimes constitute evidence that an issue was actually determined, but in this case it affirmatively appears that Judge Caffey did not consider or decide the jurisdictional issue. And where the plea of *res judicata* depends for its validity upon an actual determination, as where the judgment in another cause of action between the same parties is involved, "it is not enough that a matter was in issue, but it must clearly appear to have been adjudicated." 2 Freeman, *Judgments* (5th ed.), § 689, p. 1455; *Cromwell* v. *County of Sac,* 94 U. S. 351; *Russell* v. *Place,* 94 U. S. 606, 610; *Moran Towing & Transp. Co., Inc.* v. *Navigazione*

Libera Triestina, S. A., 92 F. (2d) 37 (C. C. A. 2d), certiorari denied, 302 U. S. 744; *Woodbury* v. *District of Columbia*, 92 F. (2d) 202 (App. D. C.); *Marine Transit Corp.* v. *Switzerland General Ins. Co. of Zurich*, 263 N. Y. 139, 147.[18]

In any event, the pleadings do not disclose any intention to raise the jurisdictional issue. The first paragraph of the bill alleged that Sorenson, Nielsen and Sielcken were all citizens and residents of the United States; the second paragraph alleged that the partnership of Crossman & Sielcken was a resident of New York and that it was neither an enemy nor ally of enemy within the meaning of the Trading with the Enemy Act (R. 319). Z. E. G.'s answer admitted the existence of the partnership prior to the outbreak of war between the United States and Germany, but otherwise denied each and every allegation in the first paragraph. As to the allegation in the second paragraph, Z. E. G. denied knowledge or information sufficient to form a belief (R. 324–325). The Government denied knowledge as to all the allegations of both paragraphs (R. 338).

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[18] The opinion of the court and the entire record of the original proceedings may be examined to determine whether the question was actually determined. *Oklahoma* v. *Texas*, 256 U. S. 70, 88; *Moran Towing & Transp. Co., Inc.* v. *Navigazione Libera Triestina, S. A.*, 92 F. (2d) 37 (C. C. A. 2d), certiorari denied, 302 U. S. 744; *Marine Transit Corp.* v. *Switzerland General Ins. Co. of Zurich*, 263 N. Y. 139, 145, 147; *Matter of Lee*, 220 N. Y. 532, 537–538; cf. *Russell* v. *Place*, 94 U. S. 606, 608.

Z. E. G.'s denial of the allegation that Sielcken resided in the United States was plainly designed simply to support its contention that it was not indebted to the partnership. In its affirmative defenses, Z. E. G. elaborated this contention in detail and, in support of the authority of Sielcken's German executors to make a binding arbitration agreement [sixth and seventh defenses (R. 329–331)], alleged that Sielcken became an enemy by virtue of his residence in Germany and that the partnership was therefore dissolved upon the declaration of war. It was in this connection that the allegations of enemy status quoted by respondent (Br. in Opp., pp. 6–7) were made.

That neither Z. E. G. nor the Government intended to raise any jurisdictional issue is shown by their answers to the sixth paragraph of the bill, to which the court below did not refer. This paragraph alleged that the court had jurisdiction of the suit under Section 9 of the Trading with the Enemy Act (R. 320). Z. E. G. failed to answer this paragraph; the Government averred that the allegations of the paragraph constituted "statements of law" to which no counter-pleading was required (R. 339). Certainly had Z. E. G. or the Government sought to raise the jurisdictional issue of whether the nonenemy requirement of Section 9 (a) was met, some indication thereof would have been given in the answers, either in response to the sixth paragraph of the complaint or otherwise.

In the absence of such an indication, it is a fair assumption that neither defendant intended to raise that issue.

B. SINCE THE JURISDICTIONAL ISSUE WAS NOT ADJUDICATED IN THE ORIGINAL PROCEEDING, THE JUDGMENT ENTERED IN THAT PROCEEDING IS NOT RES JUDICATA OF THE JURISDICTION OF THE COURT TO ENTER THE JUDGMENT

In *Stoll* v. *Gottlieb,* 305 U. S. 165, relied upon by the court below, this Court applied the general rule that, where the question of jurisdiction has been decided as an actually contested issue in one proceeding, the decision is *res judicata* of the jurisdictional issue in a subsequent proceeding. That decision is, of course, inapplicable to the present case since, as we have shown, the jurisdictional question was neither contested before nor decided by Judge Caffey.

In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, also relied upon by the court below, the rule of *Stoll* v. *Gottlieb* was extended to cover a situation where the jurisdictional issue was not raised in the earlier proceeding. In that case, a state drainage district had readjusted its indebtedness under the Act of May 24, 1934, providing for "Municipal-Debt Readjustments" (48 Stat. 798), and had secured from a United States district court a decree cancelling its old bonds and enjoining the bondholders from asserting any claim thereon. Subsequently this Court declared the

statute under which the decree was entered to be unconstitutional. *Ashton* v. *Cameron County District,* 298 U. S. 513. Certain bondholders then brought suit in the district court to recover on their bonds. The drainage district pleaded the decree cancelling the bonds as *res judicata,* and this Court held the plea to be good. Pointing to the inequities which would be caused by the adoption of a principle of absolute retroactive invalidity, the Court expressed the view that a decree entered under a statute later declared to be unconstitutional must be considered immune from collateral attack, even though the validity of the statute was not put in issue in the proceeding in which the decree was entered.

Although the Court stated generally in its opinion (308 U. S. at 378) that *res judicata* may be pleaded as a bar not only with respect to jurisdictional matters actually contested but also with respect to jurisdictional matters which might have been contested, the decision did not establish an inflexible rule of *res judicata* to be generally applied, but merely held controlling, in the particular situation presented, the policy favoring finality of judgments. That in other situations this policy may be overridden by a countervailing policy is shown by *Kalb* v. *Feuerstein,* 308 U. S. 433, decided the same day as the *Chicot County* case, and by *United States* v. *U. S. Fidelity & Guaranty Co.,* 309 U. S. 506.

In the *Kalb* case, a judgment of foreclosure against a farm debtor, entered by a state court, was held to be void and subject to collateral attack where the state court had acted without the consent of the federal district court in which a petition of the debtor under Section 75 of the Bankruptcy Act was pending. This Court declared that Congress had set up in the Bankruptcy Act an exclusive method for rehabilitating distressed farmers and that consequently any action taken by a state court beyond its jurisdiction and in derogation of the policy of the Act was an absolute nullity, irrespective of whether the question of the jurisdiction of the state court was actually, or could have been, litigated in the state court proceedings. In other words, the Court there decided that the policy in favor of the finality of judgments was, under the circumstances presented, overridden by the countervailing policy embodied in Section 75 of the Bankruptcy Act.

The same approach was taken in *United States* v. *U. S. Fidelity & Guaranty Co., supra,* a decision which, in our view, controls the present case. There the United States, as trustee for certain Indian Nations, had filed a claim for royalties in a reorganization proceeding in the federal courts against the debtor company and the surety on its lease. The debtor filed a cross-claim which was allowed by the court, and a balance in favor of the debtor was decreed. The United States raised no

objection to the District Court's jurisdiction over the cross-claim and did not appeal from the judgment. Later the United States brought suit against the surety in another federal court for the same royalties. The debtor's trustee intervened, asking a decree that the original judgment was valid and not subject to collateral attack, and that he was entitled to judgment against the Indian Nations in the amount of the balance which had been found to be due the debtor. This Court held that the district court had been without jurisdiction to enter an affirmative judgment against the United States in the original proceeding, that to the extent that the judgment granted such relief it was a nullity, and that, consequently, it was not *res judicata* in the subsequent suit. While recognizing the strength of the policy in favor of the finality of judgments, which had controlled decision in the *Chicot County* case, the Court was of opinion that this policy "must * * * yield to the principle of immunity" (309 U. S. at 513). After specifically stating that the *Chicot County* case "is inapplicable where the issue is the waiver of immunity," the Court continued (p. 514–515):

> In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely

> extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts. No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity should prevail.

It is unnecessary for present purposes to determine precisely where the line is to be drawn between the *Chicot County* case, on the one hand, and the *Kalb* and *Fidelity & Guaranty Co.* cases, on the other; it suffices for decision here that the doctrine of sovereign immunity overrides the policy favoring the finality of judgments. As we have shown, an action brought under the Trading with the Enemy Act by one who is in the position of an enemy is an unauthorized suit against the United States, to which the sovereign immunity of the United States is an absolute bar. Under the direct holding of the *Fidelity & Guaranty Co.* case, therefore, any judgment against the United States rendered in such a suit is a nullity and subject to collateral attack, at least where, as here, the jurisdictional issue was not mooted in the original proceeding.

The case is the same whether the Congress has withheld all consent or, as is usually the situation, has waived its immunity with respect to a limited class of parties or subject matter. If the suit falls outside the scope of the statutory grant, the want of consent is absolute and any judgment which is rendered may be questioned collaterally. It is the lack of consent which makes the judgment void, and not the type of question involved in determining whether or not consent was given or the type of proof necessary to establish the lack of consent.[19]

Respondent seeks to avoid the controlling force of the *Fidelity & Guaranty Co.* decision by urging that there the suit was "of a class" over which the court had no jurisdiction while here, and in the *Chicot County* case, the court had jurisdiction over the "class of case" but no jurisdiction over the particular suit (Br. in Opp., pp. 13–14). The attempted distinction is purely verbal; respondent has not defined the term "class of case" and without such a definition the distinction has no sub-

[19] The jurisdiction of the court depended upon determination of Sielcken's residence, and the court necessarily had jurisdiction to make that determination. Every court, in every case, has jurisdiction to determine its own jurisdiction. But jurisdiction to determine jurisdiction is far different from jurisdiction to enter judgment against the United States in a suit where jurisdiction is plainly absent, even though its absence is not pointed out by government counsel and the jurisdictional issue is not contested. Certainly, when the power to decide the jurisdictional issue is not exercised, the existence of that power cannot add validity to a judgment otherwise void. Cf. *Vallely* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 355.

stance. Certainly in normal speech suits by enemies under the Trading with the Enemy Act would as readily be denominated a "class of case" as counterclaims against the United States (*United States* v. *U. S. Fidelity & Guaranty Co., supra*) or as the peculiar type of suit involved in *United States* v. *Ickes,* 84 F. (2d) 257 (App. D. C.), which respondent puts on the other side of the "class" line from the present case.

It may be that in making the "class of case" argument, respondent intends to draw a distinction between jurisdiction over subject matter and jurisdiction over parties and to contend that only where the court has no jurisdiction over the subject matter of the suit is its judgment a nullity and subject to collateral attack. If this be the meaning of the contention, it not only fails to explain cases such as the *Chicot County* case and *United States* v. *Ickes,* but it draws a wholly artificial line of demarcation. For example, in both the present case and in the *Fidelity & Guaranty Co.* case, which respondent would put on opposite sides of the line, there is the same basic jurisdictional defect of lack of consent by the United States to be sued: Consent is lacking in the present case because the United States has not authorized suits by persons who are enemies; it is lacking in the *Fidelity & Guaranty Co.* case because the United States has not authorized suits against it to be prosecuted by means of counter-claim. But in both cases it is the fact of, and not the reason for, the sovereign's

lack of consent which is fatal to the jurisdiction of the court. The "class of case" to which each action belongs is wholly irrelevant.

We believe it plain, therefore, that the present case falls directly within the *Fidelity & Guaranty Co.* case, that in the absence of a determination of the jurisdictional issue in the earlier proceeding the judgment rendered in that proceeding is not *res judicata* of the jurisdictional issue, and that since the judgment was clearly one against the United States which Congress had not authorized the District Court to enter, it was an absolute nullity and was properly vacated on the present motion.

C. EVEN IF IT BE HELD THAT THE JURISDICTIONAL ISSUE WAS ADJUDICATED IN THE ORIGINAL PROCEEDING, THE JUDGMENT ENTERED IN THAT PROCEEDING WAS PROPERLY VACATED

1. We have pointed out above that, as a general rule, where a jurisdictional question has been decided as an actually contested issue in one proceeding, the decision is *res judicata* of the jurisdictional issue in a subsequent proceeding. *Stoll* v. *Gottlieb*, 305 U. S. 165. But this rule is not one of mechanical application and other and competing policies may sometimes be entitled to overriding consideration. Thus in *Kalb* v. *Feuerstein, supra,* the action of a state court in ordering foreclosure after the filing of a petition under Section 75 of the Bankruptcy Act was held to be void and subject to collateral attack, irrespective of whether the issue of

jurisdiction was actually contested, or could have been contested, in the state court proceeding. Even if contested, this Court held, the policy of *res judicata* must yield to the policy embodied by Congress in the statute. That the policy forbidding suits against the United States without its consent is as strong as the policy making the jurisdiction of the federal courts exclusive in proceedings for the rehabilitation of distressed farmers cannot admit of doubt. See *United States* v. *U. S. Fidelity & Guaranty Co., supra,* at 514.

Moreover, even if under some circumstances an adjudication of the issue of waiver of immunity may be deemed to be *res judicata* of that issue, there are special considerations in this case which override the desirability of finality. Had the judgment for the plaintiffs been obtained prior to the termination of the war, the national interest in withholding funds from an enemy or a person aiding an enemy would certainly be recognized as superior to any private interest in the finality of litigation. The national interest, we submit, requires the same result even after the restoration of peace.

Congress provided in Section 12 of the original Trading with the Enemy Act (40 Stat. 411, 424) that "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: * * *." Section 5 of the Joint Reso-

lution of July 2, 1921 (42 Stat. 105), which terminated the war, provided that the property of German nationals held by the United States "shall be retained by the United States of America and no disposition thereof be made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * or successors, shall have * * * made suitable provision for the satisfaction of all claims against said Governments." Thereafter, the Congress adopted a number of amendments to the Trading with the Enemy Act, in particular, the Winslow Act of March 4, 1923 (42 Stat. 1511), which permitted an enemy to recover up to $10,000 of the principal of his seized property and $10,000 annually of income from the property, and the Settlement of War Claims Act of 1928 (45 Stat. 254), which permitted the return of eighty per cent of the property seized to nationals of the former enemy countries and one hundred percent to American nationals. The limitations on the amounts returned were adopted for the purpose of providing a fund for the payment of claims of American nationals against the German government, in the event that Germany failed to make suitable provision for the settlement of American claims. S. Rep. No. 273, 70th Cong., 1st Sess., p. 13. The German government entered into an agreement on June 23, 1930, by which it undertook to pay in installments a sum

equal to the estimated claims of American nationals but shortly thereafter failed to make the agreed payments. Accordingly, the Congress enacted (48 Stat. 1268) that all payments under the Trading with the Enemy Act or Settlement of War Claims Act should be suspended except to the extent permitted by the President. It should be noted that Congress never modified or relaxed the provision of Section 9 (a) of the Trading with the Enemy Act limiting debt claims to those of nonenemies.

It thus appears that the seized property which was not returnable or subject to a debt claim under Section 9 (a) was held by the United States as a means of securing satisfaction of American claims from the German government. Cf. *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118–119. Public interest in strengthening the position of the United States in obtaining from a foreign power a just settlement of American claims is superior, we submit, to any private interest in the finality of litigation. *Cf. Burnet* v. *Brooks,* 288 U. S. 378, 396.

2. Finally it should be observed that a motion to vacate is not a collateral attack but a method of direct review to which the doctrine of *res judicata* is inapplicable.

That a motion to vacate a judgment is a direct and not a collateral attack has been recognized both by the courts and commentators. *Johnson* v. *Man-*

hattan Railway Co., 289 U. S. 479, 495–496; *Cohen* v. *Portland Lodge, etc.*, 152 Fed. 357 (C. C. A. 9th); 1 Freeman, *Judgments* (5th ed.) § 2; 1 Black, *Judgments* (2d ed.) § 252. Its object, like any other method of direct review, such as appeal, a motion for a new trial or for a rehearing, or a bill of review, is to nullify the judgment in the same proceeding. Cf. Van Fleet, *Collateral Attack* § 2. In this respect it differs fundamentally from a collateral attack, in which the court is asked to disregard a prior judgment pleaded in bar of the relief sought, usually in a proceeding entirely independent of that in which the prior judgment was rendered.

The doctrine of *res judicata* has traditionally been regarded as inapplicable to a direct attack upon a judgment. 2 Freeman, *Judgments* (5th ed.) § 627, p. 1324. The courts have long enjoyed plenary power to vacate, modify, or correct all judgments during the term in which they were rendered (*Doss* v. *Tyack*, 14 How. 297, 303; *Basset* v. *United States*, 9 Wall. 38, 41; *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U. S. 25, 40; *Zimmern* v. *United States*, 298 U. S. 167, 169–170) and to vacate judgments for lack of jurisdiction at any time, regardless of the expiration of the term (1 Freeman, *Judgments* (5th ed.) §§ 198, 226, 227; *Clark* v. *Arizona Mutual Savings and Loan Association*, 217 Fed. 640 (D. Ariz.), aff'd, 220 Fed. 1 (C. C. A. 9th); *United States* v. *Turner*, 47 F. (2d)

86 (C. C. A. 8th)).[20] In the federal courts the term of court as such is no longer significant. See Rules of Civil Procedure, 6 (c).[21]

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[20] *Accord:* 1 Black, *Judgments* (2d ed.), § 307; *In re Dennett*, 221 Fed. 350 (C. C. A. 9th), certiorari denied, 238 U. S. 628; *Mellon* v. *St. Louis Union Trust Co.*, 240 Fed. 359, 361 (C. C. A. 8th); *Macfarland* v. *Saunders*, 25 App. D. C. 438; *United States* v. *Ickes*, 84 F. (2d) 257 (App. D. C.); *Pollitz* v. *Wabash Ry. Co.*, 180 Fed. 950 (C. C. S. D. N. Y.), reversed on other grounds, 218 U. S. 312; *United States* v. *One Essex Touring Automobile*, 276 Fed. 28, 29 (N. D. Ga.); *Maury's Trustee* v. *Fitzwater*, 88 Fed. 768 (D. W. Va.); *Thomas* v. *American Freehold Land & Mortgage Co.*, 47 Fed. 550, 558 (C. C. S. D. Ga.); *United States* v. *Wallace*, 46 Fed. 569, 570 (D. S. C.); *cf. Humphries* v. *District of Columbia*, 174 U. S. 190.

[21] Rule 60 (b) of the Federal Rules of Civil Procedure, which provides for relief from a judgment or order within six months after the taking of the judgment or order, expressly states that this provision "does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding". The purpose of the rule was to extend, rather than to restrict, the right to direct relief, and it seems plain that it does not do away with the right to vacate at any time judgments void for want of jurisdiction. See 3 Moore's *Federal Practice* §§ 60.02–60.04.

Although the present motion was made before the effective date of the new rules (R. 5–6), it was still pending on September 16, 1938, when the rules came into force, and the judgment of the District Court was not entered until April 28, 1939 (R. 1103).

Rule 86 provides that the new rules shall govern all further proceedings in actions pending on the effective date of the rules, "except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

To apply the doctrine of *res judicata* to direct review would be completely anomalous.[22] The very purpose of a rehearing or a new trial is to provide a redetermination of issues already litigated and adjudicated. The courts have, it is true, recognized a limitation as to the time in which revision may be had even in the same proceeding, but this limitation was founded on the view that after the expiration of the term in which judgment was rendered the proceeding passed beyond the court's control. *Bronson* v. *Schulten,* 104 U. S. 410, 415. It had no relation to the doctrine of *res judicata.* A general rule that an issue may be litigated but once would preclude reconsideration of the same proceeding whenever revision of the judgment were sought, whether a week after its entrance or a year. Moreover, as previously observed, the courts have always had power to vacate a judgment for want of jurisdiction at any time. If it be deemed desirable to modify past practice by limiting the time within

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[22] This Court has always distinguished between direct and collateral attack in applying the rule of *res judicata* and has never extended the doctrine to jurisdictional issues in cases of direct review. The cases of *Forsyth* v. *Hammond*, 166 U. S. 506, 517, *Des Moines Navigation and Railroad Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 557–559, and *Dowell* v. *Applegate*, 152 U. S. 327, 340, all involved collateral attacks made in independent proceedings. The recent decisions in *Stoll* v. *Gottlieb*, 305 U. S. 165, 172, 176, 177, and *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 376, 377, relied on by the court below, were expressly limited to collateral attack.

which judgments may be set aside on jurisdictional grounds, the doctrine of laches may properly be invoked in private litigation (*Bronson* v. *Schulten,* 104 U. S. 410, 414–418; *Societe Fonciere et Agricole des Etats Unis* v. *Milliken,* 135 U. S. 304, 308–309), although not where the Government is the moving party. Cf. *United States* v. *Summerlin,* 310 U. S. 414.

This Court has never had occasion to consider the question of the application of the doctrine of *res judicata* to a direct attack by motion to vacate. The decision in *Vallely* v. *Northern Fire & Marine Insurance Co.,* 254 U. S. 348, however, supports the view that a judgment may be set aside on motion to vacate for want of jurisdiction at any time. In that case an order adjudicating an insurance company an involuntary bankrupt was vacated on motion for want of jurisdiction. The Court observed (pp. 353–354):

> Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal.

The jurisdictional issue had not been litigated, it is true. The case was distinguished upon this ground in *Stoll* v. *Gottlieb, supra,* and also upon the further ground that the attack was by motion to vacate. 305 U. S. at 172. But in *Chicot County*

Drainage District v. *Baxter State Bank, supra,* a case similar on its facts to the *Vallely* case, a former adjudication was held conclusive even where the jurisdictional issue had not been litigated, leaving only the distinction in the method of attack. The *Chicot County* case did not purport to overrule the earlier decision, and in *Kalb* v. *Feuerstein, supra,* decided the same day, the *Vallely* case was twice cited as authoritative. 308 U. S. at 439. The decisions may be reconciled, it would seem, only on the assumption that the doctrine of *res judicata* has no application to a direct attack by motion to vacate.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

FRANCIS BIDDLE,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
FRANCIS J. MCNAMARA,
MELVIN H. SIEGEL,
RICHARD H. DEMUTH,
Special Assistants to the Attorney General.
OSCAR H. DAVIS,
FRANK C. STERCK,
Attorneys.

OCTOBER 1940.

APPENDIX

The Trading with the Enemy Act of 1917, c. 106, 40 Stat. 411 (U. S. C. A., Title 50, Appendix) provides in part:

> SEC. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.
>
> * * * * *
>
> SEC. 7 (c).
>
> * * * * *
>
> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the

net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

SEC. 9 (a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in

equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

SEC. 9 (f). Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

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IN THE

Supreme Court of the United States

October Term, 1939

ROBERT H. JACKSON, Attorney General of The United States, on behalf of the United States, and as successor to the Alien Property Custodian, Petitioner,

v.

IRVING TRUST COMPANY, as Executor of HERMANN SIELCKEN, Deceased, *et al.*

Brief for Irving Trust Company as Executor of Hermann Sielcken, Deceased, in Opposition to Petition for Writ of Certiorari.

LEONARD B. SMITH and
SELDEN BACON,
Solicitors for Irving Trust Company, as Executor.
15 Broad Street,
New York, N. Y.

NATHAN L. MILLER,
SELDEN BACON,
Of Counsel.

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IN THE

Supreme Court of the United States

ROBERT H. JACKSON, Attorney General of The United States, on behalf of the United States, and as successor to the Alien Property Custodian, Petitioner,

v.

IRVING TRUST COMPANY, as Executor of HERMANN SIELCKEN, Deceased, *et al.*

Respondent's Answering Brief to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

I.

History of the Case.

This is not a suit between the petitioner and the respondent as the title now used by the petitioner might indicate.

The petition refers to two suits, one which it calls "the prior suit" (p. 3), and the other "the present suit" (p. 7). There is only one suit. That suit was brought in 1927 by John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against Howard Sutherland, as Alien Property Custodian, Frank White, as Treasurer of the United States, and Zentral Einkaufs Gesellschaft, m.b.H., defendants. All the defendants appeared and answered, the

defendants Custodian and Treasurer moving to dismiss the bill for insufficiency; and, after a trial of the suit, participated in by all parties, a final decree for the plaintiffs was rendered on December 30, 1929. Without appealing from it, the defendants Custodian and Treasurer paid it on April 12, 1930 (R. 2 and 1071).

What the petition calls "the present suit" was in fact merely a motion made in the name of the United States to vacate that decree, over eight years after it had been paid; which motion was entitled in the original suit (R. 5), and was made solely "on the ground that said final decree is void because this Court", *i. e.*, the District Court, "was without jurisdiction to enter the same" (R. 5).

This respondent was not a party to the suit. It was allowed to intervene on the motion to vacate as one "having an interest acquired under the decree of December 30, 1929 subsequent to its entry". The defendant Treasurer, did not join in the motion; and the motion was abandoned almost at the start as against the Executor of the plaintiff Nielsen (R. 3 and 295-296). Though the motion was originally made in the name of the United States, which was not nominally a party, the petitioner, as Successor to the Alien Property Custodian, was subsequently brought in, and the matter has been dealt with as though he had originally been the moving party.

Though the decree was not a nullity unless it so appeared on the face of the record, the motion was not made on the record. It was made on the affidavit of an attorney in the Department of Justice who did not pretend that he had any knowledge of the facts (R. 7 and 53). The

affidavit with the exhibits attached dealt with matters *dehors* the record and largely with events subsequent to the decree, in an obvious effort to retry the case on affidavits and to establish a charge of fraud and collusion. Every such charge was vigorously denied in answering affidavits of persons having actual knowledge of the facts.

At the same time this respondent, from the inception, insisted that no such issues could be tried on motion, or otherwise than by bill of review (R. 316).

The Circuit Court of Appeals, citing *United States* v. *Throckmorton,* 98 U. S. 61, 66, held that the decree could not be impeached for fraud, "on the very grounds urged at the original trial" (R. 1125); that even the remedy by bill of review for fraud extrinsic to the issues involved in the suit, would only be allowed if the evidence "was not available at the time the original suit was litigated" and if it were "presented without undue delay after discovery" (R. 1126); and that "in no event would there be any justi-"fication for setting aside a decree on affidavits without "examination and cross-examination of witnesses, particu-"larly where the affidavits proved to be contradictory in "respect to important issues" (R. 1126). In concluding, the Circuit Court of Appeals pointed out that the District Court in 1939 "only vacated the decree for lack of jurisdic-"tion" (R. 1126).

The order of the District Court vacating the decree will be found at page 1103 of the record. The sole ground of vacation was declared to be that the decree was "void and of no effect whatsoever because this Court was without jurisdiction to enter the same" (R. 1106).

No error is assigned and no question for review is suggested by the petition in respect of the above rulings of the Circuit Court of Appeals as to any claims of fraud or collusion; although the petitioner refers to charges of fraud and collusion in footnotes on pages 7 and 8.

The petition, like the original motion, really presents only the basic question of the jurisdiction of the suit brought in 1927 and determined by final decree in 1929.

There were no express findings in support of the decree of 1929, since it was rendered before the adoption of the rule requiring findings. It, therefore, imports findings favorable to the plaintiffs on every issue in the case.

The Court will want to know what the issues were and how they were determined by the decree. The pleadings and the decree will not be found in the moving papers. The notice of motion made no mention of the pleadings. This respondent, in its petition for leave to intervene, submitted the pleadings, including the 1928 motion of the defendants Alien Property Custodian and Treasurer to dismiss the bill for failure to state facts entitling plaintiffs to relief under the Trading with the Enemy Act; as well as the decree. They will be found at pages 318-352 of the record.

II.

The petitioner's statement of the case and of the questions involved omits essential facts and disregards the issues involved and the determination of them by the Decree of 1929.

The governing facts were well stated by the Circuit Court of Appeals (R. 1118-1124).

(A) The petition, in stating the contents of the pleadings, makes vital omissions and some errors:

(1) It omits two vital paragraphs of the bill—the first and second—though it purports to paraphrase the substance of the second paragraph in a footnote on page 5. The important first paragraph of the bill the petitioner ignores completely. It may be only a coincidence that the District Court in passing on the motion to vacate also overlooked the first paragraph, although Judge HAND in the Circuit Court of Appeals called attention to the oversight (R. 1123). We quote the two paragraphs in full:

> "First: At all the times hereinafter mentioned the plaintiffs, John S. Sorenson and Thorleif S. B. Nielsen, and one Hermann Sielcken, all being citizens and residents of the United States, were engaged in business as exporters, importers and commission merchants as copartners doing business under the firm name and style of Crossman & Sielcken, and said partnership continued its said business in regular course, up to the date of the death of said Hermann Sielcken, as hereinafter set forth.

"Second: Said partnership of Crossman & Sielcken at all times has had its principal place of business in the Borough of Manhattan, City, State and Southern District of New York, and has been and is a resident of said Borough of Manhattan, City and State of New York, and has not at any time been a resident within territory (including that occupied by the military and naval forces) of any nation with which the United States was at war and was not, nor at any time has it been, an enemy or ally of enemy within the meaning and purview of those terms as used and defined in the Act of October 6, 1917, known as and herein referred to as the Trading with the Enemy Act or in any act amendatory thereof and supplemental thereto or in any proclamation or executive order issued by the President of the United States pursuant to Subsection (c) of Section 2 of said Trading with the Enemy Act" (R. 319).

(2) The petition merely says, also in a footnote, that the answer of Z.E.G. and the Alien Property Custodian denied knowledge as to the allegation that the partnership was neither an enemy nor an ally of enemy.

The allegations of both paragraphs were squarely put in issue by all of the defendants, except that Z.E.G. admitted the existence of the partnership prior to the outbreak of the war and that its principal place of business was in the Borough of Manhattan (R. 324-5 and 338).

The answer of the defendant, Z.E.G., expressly alleged (in its paragraph 13):

"That at the outbreak of war between the United States and Germany, to wit, April 6, 1917, the said Hermann Sielcken resided in Germany and became an alien enemy" (R. 329).

(in its paragraph 14):

> "That the firm of Crossman & Sielcken was dissolved by the outbreak of war" (R. 329).

(in its paragraph 27):

> "That the said Hermann Sielcken owned all the assets of Crossman & Sielcken; that the estate of Hermann Sielcken succeeded to all assets thereof and the plaintiffs are estopped from making the claim set forth herein" (R. 331).

The petition says (p. 4) that the Alien Property Custodian answered, "adopting the defenses of Z.E.G." The Custodian and Treasurer appeared and answered on January 23, 1928 (R. 380), but the answer of Z.E.G. was not filed until September 6, 1929 (R. 2). Naturally, the former answer says not a word about the latter, which was not even in existence when the former was filed (R. 338-341). Nevertheless all these issues were raised and were disposed of by the decree in 1929 in favor of the plaintiffs.

(B) The petition says nothing of the motion of the Custodian and Treasurer to dismiss the bill on the ground, among others, that "(3) plaintiffs have not stated facts sufficient to entitle them to equitable relief under the provisions of the Trading with the Enemy Act" (R. 337-8). At the same time the petition suggests no question for review as to the sufficiency of the bill.

(C) The petition says on page 4 that "the District Court held that the shipments were made pursuant to c.i.f. contracts and that the risk of loss therefore rested with the consignee." The bill of complaint alleged, and

the decree sustained the allegation, that the agreement between Crossman & Sielcken and the predecessor of Z.E.G. was one of agency to purchase goods for the account of said predecessor and for repayment of the sums expended with a commission of ten per cent thereon; and the suit was for the amount actually paid out by Crossman & Sielcken, plus the agreed commission of 10% (Paragraphs Seventh, Eighth and Ninth, R. 320, 321).

The petition also says on page 4 that the District Court found "that Z.E.G. was indebted to the *partnership.*" The statement is inaccurate. The decree expressly adjudged that Z.E.G. "is indebted to *the plaintiffs*" in the sum stated and that the defendants, Custodian and Treasurer, are directed to pay said amount "to the plaintiffs" out of the funds of the debtor seized by the Alien Property Custodian and held by him and the Treasurer (R. 351-352), thus disposing completely of the defense that the plaintiffs were not the owners of the claim.

(D) The petition further misstates the issues and the determination of them by the decree.

Despite the above quotations from the bill and the answer of Z.E.G., and despite the motion to dismiss, the petition says (p. 5) that

> "The sole issue litigated in the 1929 proceeding was whether any debt was due from Z.E.G. No issue was made by the pleadings or raised at the trial as to whether the surviving partners were precluded from suing because Section 9 (a) of the Trading with the Enemy Act expressly limited suit to a person 'not an enemy.'"

The petition further says (pp. 5-7) that the District Court in 1929 held:

> "That Sielcken while an enemy as defined in the Act, did not become an enemy within the meaning of the dissolution doctrine, and that the claim therefore did not pass to Sielcken but remained a partnership asset. The question was never mooted and Judge CAFFEY did not decide whether the court was without jurisdiction of the suit because Sielcken was admittedly an 'enemy' within the meaning of the Trading with the Enemy Act. Apparently it was assumed by all parties that the court did have jurisdiction."

This is asserted in the face of the motion of the Custodian and Treasurer to dismiss the bill and in the face of the allegations of the bill that the plaintiffs had never been enemies or allies of enemies, and that Sielcken was a citizen and resident of the United States up to the time of his death, and in the face of the decree sustaining these allegations.

The District Court did not find, and it was not admitted, that Sielcken was an "enemy within the meaning of the Act."

The petition attempts to support its statement by a quotation in the footnote on page 6 from a mere colloquy between Court and counsel, but even the colloquy plainly shows that the view of the Court was that the mere fact that an American citizen "was in an enemy country" at the outbreak of the war did not make him an "enemy" within the meaning of the statute; and therefore did not result in a dissolution of an American partnership of which he was a member.

It should be noted in passing that there has never been any question whatsoever, even on the motion to vacate, as to the non-enemy status of the plaintiffs.

(E) Having exhibited such disregard of the issues and the determination of them by the 1929 decree, the petition naturally makes many statements of fact contrary to what was necessarily adjudged by the decree.

For example, it says that the Articles of Co-partnership required the surviving partners to pay over the assets of the partnership to Sielcken's executors on his death. We shall not burden the Court with an analysis of the Articles of Co-partnership, the construction of which was for the trial court. The petitioner's statement is incorrect; but, on this application, it is sufficient for the Court to know that the decree of 1929 expressly adjudged that Z.E.G. was indebted "to the plaintiffs", who sued as surviving partners, and that the debt should be paid "to the plaintiffs" (R. 331-332).

The petition also says on page 3 that "Sielcken died in Germany on October 8, 1917 after having resided there continuously since 1914," despite the express averment in paragraph First of the bill above quoted, that Sielcken was at all times up to the time of his death a citizen and resident of the United States; an allegation sustained by the decree.

Since the conduct of the trial, the rulings of the Trial Court and the sufficiency of the evidence are not under review, it would be inappropriate to discuss, indeed space will not permit of any discussion of the merits of the original cause.

(F) The question propounded on page 2 of the petition utterly ignores the issues and the determination of them by the decree of 1929.

That question assumes the non-enemy status of the plaintiffs who were expressly adjudged by the decree to have title to the claim sued on. That question assumes—despite the issues raised by the bill, by the motion to dismiss, and by the answers as above, and despite the decree of the Trial Court—that Sielcken was both the beneficial owner of the claim and an enemy; and on the basis of those assumptions the proposition contended for is, in effect, that the Court should have decided the issues in the case in favor of the defendants; and that not having done so, it had no jurisdiction to decide the case at all. But as a learned Judge has observed "The test of jurisdiction is the right to decide, not right decision." *Phebus* v. *Search* (264 Fed. 407, 411).

III.

The reasons for granting the writ assigned by the petition are unsound.

The petition says (p. 9): "The original suit was brought under Section 9(a) of the Trading with the Enemy Act, * * *."

Undeniably, the District Courts have jurisdiction of such suits. There is no claim to the contrary.

The Appendix to the petition quotes Section 9(a) with elisions. It makes no reference to Section 17 of the Act. We quote both these Sections in an Appendix hereto, sup-

plying an important elision from Section 9(a), plainly emphasizing that the right to sue is given persons "*claiming* any interest, right or title", etc.

It being conceded that the suit was brought under the Trading with the Enemy Act, all of the defendants having appeared, the defendants, Custodian and Treasurer, having moved to dismiss the bill on the ground of failure to allege facts sufficient to entitle the plaintiffs to relief under the Act, and all of the defendants having answered, the Trial Court was called upon to interpret the Act, to decide whether the bill stated facts sufficient to bring the case within the Act, and to adjudicate the issues raised by the pleadings; and a decree having been rendered after a trial participated in by all parties, it is *res judicata.*

Having the power to decide, any errors made by the Trial Court, whether of fact or law, (and we are far from suggesting that there were any), could be reviewed only by direct appeal from that decree of 1929.

The Circuit Court of Appeals relied on two recent decisions of this Court:

> *Stoll* v. *Gottlieb* (305 U. S. 165);
> *Chicot County Drainage District* v. *Baxter State Bank* (308 U. S. 371).

Since the decision of the Circuit Court of Appeals herein this Court has again reaffirmed the principle of those two decisions—*Sunshine Anthracite Coal Co.* v. *Adkins,* (No. 804 of this Term, decided May 20, 1940). See also *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66.

However, the petitioner asserts that the decision of the Court of Appeals herein is in conflict with the decision

of the Court of Appeals for the District of Columbia in *United States* v. *Ickes,* (84 Fed. [2d] 257), and that the present case should be governed by the case of *United States* v. *United States Fidelity & Guaranty Co.,* decided by this Court March 25, 1940 (84 L. C. Ed. 619).

The decision of the Court of Appeals in the *Ickes* case was expressly based on the ground that "the claim asserted "here is outside the class over which the District Court "was given jurisdiction" (p. 260 of opinion).

In the *Fidelity & Guaranty* case, this Court held that a judgment of the District Court against the United States on a cross-claim was void since no statutory authority had granted jurisdiction to that Court to entertain or adjudicate a cross-claim against the United States.

The line of demarcation is easily drawn.

On one side of that line, where the Court has jurisdiction to deal with the *class of case* presented, stand the present case and the long line of decisions culminating in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371; *Stoll* v. *Gottlieb,* 305 U. S. 165; *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66; *Sunshine Anthracite Coal Co.* v. *Adkins* (No. 804 this Term, decided May 20, 1940).

On the other side of that line stand cases where the record on its face showed a case *of a class* over which the Court had no jurisdiction whatever. Such are the cases of *United States* v. *United States Fidelity & Guaranty Co.,* decided by this Court on March 25, 1940 (84 L. C. Ed. 619); *Vallely* v. *Northern F. & M. Ins. Co.,* 254 U. S. 348;

Sevilleta de la Joya Grant v. *Belen Land Grant*, 242 U. S. 595; *Yamashita* v. *Hinkle*, 260 U. S. 199, and *United States* v. *Ickes*, 84 Fed. (2d) 257.

In each of the latter set of cases the Court entering the challenged decree had no jurisdiction whatever over the *class* of case which the record before it presented; and there, as this Court said in the *Vallely* case, "to extend the Act" (so as to cover the excepted class) "is to enact a law, not to execute one" (254 U. S. 356).

In the present case, the District Court undeniably had jurisdiction of cases brought under the Trading with the Enemy Act, and concededly the present case was such a suit. In fact, the bill on its face declared that it was brought under that Act (R. 320) and the present petition admits that it was so brought (Pet. p. 3).

The plaintiffs were admittedly not enemies. That the debt was owing to them was directly challenged by Z.E.G.'s answer (R. 329, 331) and the Court decided expressly that the debt was due to them as surviving partners. The allegations of the bill that they had filed this claim with the Custodian and had made no application to the President (R. 322), were expressly admitted by the answer (R. 339).

The suit was thus in every feature directly within the terms of the Act.

The petitioner has failed to note the radical distinction between erroneous exercise of jurisdiction and assumption of a jurisdiction not possessed. That distinction has been too plainly pointed out by this Court in multitudinous decisions to require further elaboration.

There is no question in this case concerning representatives of the Government conferring pretended jurisdiction by silence or acquiescence. This respondent made no such claim. And the Circuit Court of Appeals took no such position. The statute under which the suit was brought conferred the jurisdiction. In the exercise of the jurisdiction so conferred, the District Court was required to decide, and its decree necessarily imports that it did decide, every question which the Attorney General has now sought to retry on affidavits. One decision by the Court of first instance was all the defendants were entitled to. If aggrieved in respect of any matter, either of fact or law, their remedy was to appeal. Even though the decision had been erroneous on every issue involved, it would still be conclusive unless and until corrected on appeal.

Chicot County Drainage District v. *Baxter State Bank* (308 U. S. 371);
Stoll v. *Gottlieb* (305 U. S. 165);
In re Metropolitan Trust Co. (218 U. S. 312);
Dowell v. *Applegate* (152 U. S. 327);
Des Moines Nav. & R. R. Co. v. *Iowa Homestead Co.* (123 U. S. 552);
Bronson v. *Schulten* (104 U. S. 410);
M'Cormick v. *Sullivant* (10 Wheat. 192).

When analyzed, each contention advanced by the petitioner as a ground for the writ is based on a claim that the District Court in 1929 erred in its decision. No one of the petitioner's contentions really goes to any question of that Court's jurisdiction over the case presented to it. Every question presented by the 1938 motion had been presented and decided by the Trial Court in 1929.

The present case comes directly within the recent decisions of this Court in *Stoll* v. *Gottlieb*, 305 U. S. 165 and *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371; and it is not within the principles declared in the recent decision of this Court in *United States* v. *United States Fidelity & Guaranty Co.*, decided March 25, 1940 (84 L. C. Ed. 619).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LEONARD B. SMITH and
SELDEN BACON,
Solicitors for Irving Trust Company, as Executor.

NATHAN L. MILLER,
SELDEN BACON,
Of Counsel.

Appendix.

Trading With The Enemy Act.

SECTION 9. (*a*) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: PROVIDED, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a

corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SECTION 17. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary' (sections 225 and 345 of Title 28 Judicial Code and Judiciary)."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 75

ROBERT H. JACKSON, Attorney General of the United States, on behalf of the United States, and as successor to the Alien Property Custodian,

Petitioner,

v.

IRVING TRUST COMPANY, as Executor of HERMANN SIELCKEN, *Deceased,*

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

LEONARD B. SMITH
and
SELDEN BACON,
Attorneys for Respondent.

NATHAN L. MILLER,
SELDEN BACON,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

NO. 75

ROBERT H. JACKSON, Attorney General of the United States, on behalf of the United States, and as successor to the Alien Property Custodian,

Petitioner,

v.

IRVING TRUST COMPANY, as Executor of HERMANN SIELCKEN, *Deceased,*

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinions below, that of the District Court (R. 1074-1092, 27 Fed. Supp. 44) and that of the Circuit Court of Appeals [R. 1118-1126, 109 Fed. (2d) 714] are reported under the title "*Sorenson, et al.* v. *Sutherland, et al.*"

Jurisdiction.

The order of the Circuit Court of Appeals, mistakenly called a judgment by the Petitioner, was entered March 7, 1940 (R. 1127). It reversed an order of the District Court for the Southern District of New York entered April 28, 1939 (R. 1103), which vacated for want of jurisdiction a decree of the same Court of December 30, 1929 (R. 35). Certiorari was granted on June 3, 1940 on a petition filed on May 11, 1940. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code.

Question Presented.

The Petitioner both in the petition for the writ and in his brief here asks review of a single question:

> "Whether an unappealed judgment against the Alien Property Custodian under Section 9 (a) of the Trading with the Enemy Act, on a claim to recover for a debt, may be set aside for want of jurisdiction on the ground that the beneficial owner of the claim sued on was an 'enemy,' as defined by that Act."

Stated more properly, the question is:

> Whether an unappealed judgment against the Alien Property Custodian and the Treasurer of the United States under Section 9 (a) of the Trading with the Enemy Act on a claim to recover a debt out of the property of an enemy seized and held by them, which judgment had been paid eight years before the motion, may be set aside on motion for want of jurisdiction, not on the ground of newly discovered evidence, but merely on the ground that one, though not

himself a party, was the beneficial owner of the claim and an enemy, as defined in that Act, when the bill of complaint stated a case entitling the plaintiffs to relief afforded by the decree; and the ownership of the claim in suit and the question whether the now alleged beneficial owner was an enemy were both at issue, were argued by counsel at the trial and determined against the defendants.

No question whatever is raised as to the sufficiency of the bill of complaint in the action to state a case under the statute or as to whether the relief granted was within the issues and the statute.

The Statute Involved.

We reproduce here the text of the statute as far as material.

The Trading with the Enemy Act of 1917, C. 106, 40 Stat. 411 (U.S.C.A. Title 50, Appendix.)

"§ 2. Definitions. The word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * *

The words 'ally of enemy,' as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

* * * * * * *

"The word 'person', as used herein shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

* * * * * *

§ 9. CLAIMS TO PROPERTY TRANSFERRED TO CUSTODIAN; NOTICE OF CLAIM; FILING; RETURN OF PROPERTY; SUITS TO RECOVER. (a) Any person not an enemy or ally of enemy *claiming* any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the

President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to *establish* the interest, right, title, or debt *so claimed*, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine *said claimant* is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the

defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the Court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

"§17. RULES BY DISTRICT COURTS; APPEALS. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary' (sections 225 and 345 of Title 28 Judicial Code and Judiciary)." (Italics ours)

Statement.

Nature of the Proceedings.—This was an independent proceeding on motion on affidavits entitled in the cause of "John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, plaintiffs, against Howard Sutherland, as Alien property Custodian, Frank White, as Treasurer of the United States, and Zentral Einkaufs-Gesellschaft m.b.H., defendants," to vacate the decree entered therein on December 30, 1929, "on the ground that the said final decree is void because this Court," i. e., the District Court, "was without jurisdiction to enter the same." (R. 5.)

The present title adopted by the Petitioner might suggest that this is a second suit between him and the Respondent and he refers in his statement to "the original action."

There has been no suit or action between the Petitioner and the Respondent. There has been but one suit—the suit of the plaintiffs Sorenson and Nielsen as above. The Respondent was not even a party to that suit. It was not even originally a party to the motion, but was permitted to intervene in the proceedings to vacate, not as a party to the suit, but solely "as one having an interest in the decree of December 30, 1929, subsequent to its entry." (R. 3, 1104.)

The Suit.—The Petitioner correctly states (brief, p. 3) that "the suit was brought under Section 9 (a) of the Trading with the Enemy Act" (R. 318-320).

In stating the allegations of the bill of complaint (id. p. 3), the Petitioner omits the important first and second paragraphs which alleged in substance that the plaintiffs at all times and that the deceased partner Sielcken up to the time of his death were citizens and residents of the United States; that the partnership of Crossman & Sielcken continued up to the death of said Sielcken; that it had its principal place of business in and was resident of the Borough of Manhattan, State of New York, had not at any time been a resident within enemy territory, and was not and had not at any time been an "enemy or ally of enemy within the meaning" of the Trading with the Enemy Act (R. 319).

The Petitioner states (brief, p. 4) that the defendants Custodian and Treasurer moved to dismiss the bill on

the grounds (b) "that no debt was owing by Z.E.G. and (c) that the plaintiffs had not stated facts sufficient to entitle them to equitable relief under the Trading with the Enemy Act." (R. 337-338).

The second ground of the motion was "It appears affirmatively from the averments of the bill of complaint that no debt is owing to the plaintiffs by the Zentral Einkaufs-gesellschaft, m.b.H."

The words "to the plaintiffs" omitted by the Petitioner directly raised the question whether the surviving partners were the owners of the claim asserted; and the third ground plainly presented the question whether the case stated in the bill was one of which the Court had jurisdiction under the statute. Yet the Petitioner contends (p. 34) that so far from raising any jurisdictional question both the Government and Z.E.G. plainly manifested an intention not to do so.

All the defendants appeared generally in the action.

The Petitioner says (p. 4) that the defendants Custodian and Treasurer denied knowledge as "to the material averments concerning the transactions giving rise to the debt." But they also denied knowledge of the important first and second paragraphs of the bill, as above (R. 338).

He also says (p. 5) that the allegations of Z.E.G. that on the outbreak of the war Sielcken resided in Germany and became an alien enemy and that the firm of Crossman & Sielcken was thereby dissolved were in support of the sixth and seventh defenses, based on an alleged arbitration award in Germany against the validity of the claim.

But those allegations were contained in the fifth, separate and distinct defense and were merely realleged in the sixth and seventh (R. 328, 329). The Petitioner does not refer to the fifth defense except in a footnote (p. 5).

The averment that Sielcken owned all the assets of Crossman & Sielcken, that his estate succeeded to such assets, and that the plaintiffs are estopped from making a claim was, as the Petitioner says, in support of the defense that the claim had been adjudicated in Germany in an arbitration between Z.E.G. and Sielcken's German Executors (R. 330, 331). But, none the less, it put the question of the title to the firm assets in issue. If title to the assets passed on Sielcken's death to his German Executors, they could arbitrate the claim.

The Petitioner says (p. 5) that "the main burden of defense was borne by counsel for Z.E.G." Yet, he says in a footnote on page 8 that a settlement made with Z.E.G. subsequent to the decree was "possibly the result of a pre-trial understanding between plaintiffs' counsel and Z.E.G." That was a settlement of an indemnity agreement and was made with the full knowledge of the representatives of the United States (R. 397).

No one can doubt that the defense interposed by Mr. Hays on behalf of Z.E.G. was a genuine defense. Mr. Rhodes, trial counsel for the defendants Custodian and Treasurer, said that he had collaborated with Mr. Hays and that both were "trying to protect the fund so far as is right" (R. 804), and it will be observed that Mr. Rhodes took an active part in the trial.

At the close of the plaintiffs' case, Mr. Rhodes for the defendants Custodian and Treasurer moved to dismiss

"because of the insufficiency of the evidence," and excepted to the denial of the motion (R. 834).

At the conclusion of the evidence, all of the defendants moved for a dismissal on the ground that the plaintiffs had failed to establish "a cause of action." The motions were overruled and the defendants Custodian and Treasurer excepted (R. 863), and the Court directed the entry of its final decree of December 30, 1929, which expressly adjudged that Z.E.G. was indebted "to the plaintiffs" in the sums stated amounting to $716,130.37, and required the defendants Custodian and Treasurer to pay said sum with interest out of the property of the defendant Z.E.G. in their custody (R. 351-352).

There were no formal findings since the rule did not then require findings. The judgment therefore imports findings in favor of the plaintiffs on every issue in the case.

The Petitioner says (p. 6) that the District Court held that the risk of loss of the cargoes rested with Z.E.G. and its predecessor, "that the partnership was not dissolved by the outbreak of the war, so that the claim against Z.E.G. did not pass to Sielcken before his death and his German Executors had no power to submit the claim to arbitration" and that the Court ruled that "even though Sielcken was an 'enemy' under the Trading with the Enemy Act, he did not become an enemy under the common law doctrine that a partnership is dissolved by the outbreak of the war," and in support of those statements, refers to a colloquy between Court and counsel during the trial. At the conclusion of the trial, the Court delivered an oral opinion on two questions in the case, and only two.

One question was whether the agreement between Crossman & Sielcken and the predecessor of Z.E.G. was a contract of sale, as the defendants contended, or a contract of agency, as the plaintiffs contended. The Court squarely ruled that it was a contract of agency.

The other question was whether, under the partnership agreement, Sielcken had title to the assets of the firm so that the title passed on his death to his German Executors who thus had the right to submit the claim to arbitration, or whether the plaintiffs, as surviving partners, had title to the claim, as was expressly adjudged by the decree as above. The Court ruled that as the plaintiffs had title, those Executors had no authority or right to settle or otherwise dispose of the claim. In the course of his oral opinion, the Court stated that it was not necessary to go into the various other phases of the case. (R. 864, 865.)

There were many colloquies during the trial. The Court made no rulings whatsoever in the course of the colloquy referred to by the Petitioner. The Court did observe that he wished to give counsel ample opportunity to reverse him if he was in error (R. 854), and, after some further colloquy, said: "I am going to give you a square ruling and you can take an exception." (R. 857.) He ruled that the partnership was not dissolved upon our entry into the war, to which no exception was taken (R. 857). He made a series of rulings to which exceptions were taken (R. 858, 862). But it will be noted that he was not requested to make and did not make a formal ruling or finding on the question whether Sielcken was an enemy.

The Petitioner does not quote that part of the colloquy referred to by the Petitoner in which the Court expressed

his agreement with the counsel for the defendants Custodian and Treasurer that under the case of *Stadtmuller* v. *Miller* (11 F. 2, 732) the word "resident" as used in the Trading with the Enemy Act meant "domiciled", or the Court's statement that there is a vital distinction "between an American citizen residing in Germany and a German citizen." (R. 856.) Obviously, the distinction is that an American citizen temporarily residing in Germany would retain his American domicile.

The Petitioner erroneously states (p. 6) that the sole question actually litigated in the 1929 proceedings was "whether any debt was owing from Z.E.G." and that "no issue was raised at the trial and no determination was made by the District Court as to whether the Court was without jurisdiction," etc.

Yet, as above shown, every allegation of the complaint was put in issue by the defendants Custodian and Treasurer, except the capacities of the Custodian and Treasurer, the seizure by the latter of property of the debtor, the presentation of the claim by the plaintiffs, and performance of conditions precedent prescribed by the statute; and the answer of Z. E. G. in addition to similar denials, affirmatively alleged the very facts now relied on to deprive the Court of jurisdiction.

The Petitioner generously concedes in a footnote on page 3 that notice of the claim was filed as required by the statute and that the bill so alleged.

Issue was raised as to every other jurisdictional fact—the American citizenship and residence of the plaintiffs and likewise those of Sielcken up to his death and the continuance of the partnership of Crossman & Sielcken up to

the latter's death in October, 1917. The jurisdictional question was raised by the motion to dismiss the complaint for insufficiency, though it is no longer contended that the facts stated by the plaintiffs in their bill of complaint were not "sufficient to entitle them to equitable relief under the provisions of the Trading with Enemy Act." And the very colloquy, which the Petitioner improperly calls findings, demonstrates that those facts were a subject of debate at the trial.

The Petitioner does not quote the following statement of the Court made in colloquy with counsel:

> "In this case, the partnership agreement was between American citizens; and it is inconceivable to me that there should be a precedent in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country which results *ipso facto* in a dissolution of his partnership.
>
> "I do not believe that it even results in a suspension during the period of the war, in a suspension of the partnership.
>
> * * * * * * *
>
> "It does not follow at all from that that he is an alien enemy in the sense that a national of the country with which we are at war is an alien enemy." (R. 852-853.)

It is obvious that the reporter erred in taking down or transcribing the language of the Court. "Precedent" was obviously substituted for "presence" and what the Court plainly said or meant to say was that it was inconceivable to him that the presence in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country results *ipso facto* in a dissolution of his partnership. In short, the Court was distinguishing between temporary residence and domicile

there which, under the *Stadtmuller* case, was necessary to make an American citizen an enemy.

Without taking any appeal, the defendants Custodian and Treasurer paid the judgment, as the Petitoner says, to the plaintiffs, and took their satisfaction on April 10, 1930 (R. 1071).

In a report to the Solicitor General, Mr. Rhodes, the trial counsel, advised against an appeal, saying among other things, the following:

> "I represented the Alien Property Custodian and the Treasurer of the United States and Mr. Hays and I co-operated fully and presented every pertinent point we could discover on behalf of the defendants. The case was heard by Judge Caffey for two days and at the conclusion of the hearing he delivered an oral opinion which was taken down in shorthand and which will be found at the end of the Transcript of Record attached hereto, in which he decided in favor of the plaintiffs.
>
> "I have gone over this Record very carefully and am convinced that the decision of the Court is correct; * * *. The plaintiffs being citizens of the United States and non-enemies within the meaning of the Trading with the Enemy Act and their debt having arisen prior to October 6, 1917, are clearly entitled to recover the same out of the funds of the debtor held by the Custodian in the Treasury of the United States pursuant to the provisions of Section 9 (a) of the Trading with the Enemy Act.
>
> * * * * * *
>
> "Inasmuch as the decision in this case is undoubtedly correct and as the enemy defendant has decided to take no appeal, there is no reason for the Alien Property Custodian and the Treasurer to take an appeal.

"I, therefore, recommend that no appeal be authorized." (R. 1015-16.)

A year before the trial, Mr. Rhodes had been made aware of the dispute whether Sielcken was domiciled in Germany or merely temporarily resident there, by a letter from Mr. Doyle, of counsel for the plaintiffs, with regard to a proposed stipulation of facts admitted before the Mixed Claims Commission before which the same claim was pending, wherein Mr. Doyle said:

> "You will note that the allegations of fact contained in our Memorial are not disputed as to any matters or as to any documents concerning which stipulation is sought. In the answer of Germany, it questions whether Mr. Sielcken was in fact a resident of the United States temporarily residing in Germany, or whether Mrs. Sielcken was such, and as to the effect of his New York will to Columbia Knickerbocker Trust Company as Executor. These matters of dispute relate only to the allegations of paragraphs (1) to (4) of our Memorial, and as to these matters stipulation is not sought." (R. 1010.)

Mr. Rhodes' attention was sharply called to the question by the answer of Z.E.G., as above, and he himself vehemently argued at the trial that Sielcken was domiciled in Germany within the ruling in *Stadtmuller* v. *Muller* (R. 854.).

Shortly after the payment of the amount awarded to the plaintiffs, the plaintiff Nielsen died and the Chase Bank as his Ancillary Executor brought a suit in the Supreme Court of the State of New York against the plaintiff Sorenson, the then sole surviving partner, the Respondent as Executor of Sielcken's Estate, and Sielcken's widow and residuary legatee, to determine the respective interests of

the parties in the recovery, Sorenson and Nielsen's Executor claiming respectively that each was entitled to 12½% of the recovery on the ground that it represented profits of the firm (R. 301, 718).

The Petitioner refers to that suit in a footnote on page 6 and says that the Government was not a party to it and that it was determined in 1933, which was three years after the suit was begun, that Respondent, as Sielcken's American Executor, had the sole right to liquidate the partnership, and that neither Sorenson nor Nielsen had been a liquidating partner, and that neither was entitled to any part of the recovery.

Doubtless the Alien Property Custodian would have been made a party to that suit but for the fact that having attempted in 1918 to seize the interest of Mrs. Sielcken in her husband's Estate on the ground that she was an enemy (R. 588-591), he released that interest in 1921 and expressly authorized the Respondent to deal with it "in the same manner as though such interest had never been reported to or demanded by the Alien Property Custodian." (Ex. O, R. 605.) Thereafter, twice as a party to accounting proceedings in the Sielcken Estate in the Surrogate's Court of New York County, by not opposing, he consented to decrees providing for the distribution of Sielcken's Estate according to the terms of his will (R. 606-617). The reason for such action was that after the war Mrs. Sielcken brought suit in California to establish her husband's and thus her own American citizenship. The Alien Property Custodian intervened and defended the suit but was beaten both at the trial and on the appeal. (*In re Sielcken*, 51 Cal. App. 538, 197 Pac. Rep. 668).

In the course of the decision in that case, the trial court said:

> "Being in Germany at the time of the outbreak of the great war, and being detained there against his desires to return to America, he steadfastly and courageously maintained that he was an American citizen, and frequently caused his assertion in that regard to be entered in the official records of the German Empire. Upon the declaration of war between the United States and Germany he was listed by the latter as an alien enemy of Germany and as an American citizen, and his property in Germany was ordered seized by the German Alien Property Custodian." (197 Pac. Rep. 670.)

It is true that at the instance of the Respondent, who was not a party to the suit resulting in the 1929 decree, it was adjudged after three years of litigation in the New York action that the Respondent as Executor was entitled to the proceeds of the recovery remaining undisposed of (R. 241), and pursuant thereto, it did receive $313,240.70 out of a total recovery of $716,130.37 and made a partial distribution of that sum (R. 305, 648).

Though that suit was solely concerned with the disposition of the recovery and not at all with the plaintiffs' right to maintain a suit for it, the New York decree did say that by virtue of the terms of the partnership agreement and of Sielcken's will, the sole right to liquidate the partnership assets and property was in the Respondent as Executor and that Sorenson and Nielsen were not and had not at any time been liquidating partners of the firm of Crossman & Sielcken, dissolved by the death of Herman Sielcken on October 8, 1917 (R. 240).

Of course, the real ground of the decision in the New York suit was, as stated in the decree, that a settlement

made in December, 1917, "was intended by the parties thereto to be and was in fact a complete and final settlement by virtue of which the plaintiff's testator," (Nielsen) "and said Sorenson each accepted the sum then paid to him in full settlement of all claims to the assets of said firm of Crossman & Sielcken and the profits of said partnership." (R. 242). In short, the Court held that a settlement made in 1917 was intended to cover a recovery made in 1930.

The District Court, in 1929, in the suit now under consideration construed the Articles of Copartnership and held that the plaintiffs did have title to the firm assets as surviving partners. So much was determined by the express adjudication of the decree that Z.E.G. was indebted to the plaintiffs in the sums stated.

The Petitioner fails to call attention to the colloquy in which the precise terms of the Copartnership Articles were called to the Court's attention in the Federal suit, by the plaintiffs therein. (R. 807). The New York Court apparently disagreed with the construction of those Articles previously adopted by the District Court. And, strange to say, the District Court in deciding the present motion even went further, reversed its own previous holding, and held that the suit was collusive because the plaintiffs had no right even to bring it (R. 1083-5).

Judge CAFFEY, who tried the case, thought that the "capital" of the firm was what was left after liquidation and payment of debts and division of profits, and that the partners had title to the firm assets. Apparently, the New York Court took a different view and Judge GODDARD, on the motion to set aside the decree for want of jurisdiction, went even further and undertook to overrule Judge CAFFEY.

There was certainly a basis for the claim of the plaintiff Sorenson and the Chase Bank representing the plaintiff Nielsen that each was entitled to a share of the recovery as profits since the United States Government imposed a tax on it as such and was paid out of the proceeds of the recovery $22,192.65 in settlement of that tax (R. 690).

Moreover, the plaintiffs were, of course, personally liable for the debts of the firm and claims were presented by alleged creditors for services in connection with the transaction out of which the debt arose amounting to 60% of the recovery (R. 718). Some of those claims were settled by payments aggregating $40,000 out of the recovery and an additional claim was still in litigation when this motion was made (R. 719, 688-699).

The Present Motion.—The Petitioner correctly says that the United States moved in 1938 to set aside the 1929 decree "on the ground that the District Court had been without jurisdiction." That was the sole ground of the motion (R. 5), and it was the sole ground stated in the order of the District Court for vacating the 1929 decree (R. 1106).

The United States was not a party to the suit. The Petitioner says that the Attorney General as successor to the Alien Property Custodian subsequently appeared as a party. He did obtain an order substituting "The Honorable Frank Murphy as Attorney General of the United States and as successor to the Alien Property Custodian in behalf of the United States of America * * * in lieu of The Honorable Homer S. Cummings as Attorney General of the United States and as successor to the Alien Property Custodian in behalf of the United States of America" (R.

1095), although the latter was never a moving party. However, not to be technical, the Respondent has treated the proceeding as though it was instituted in the first instance by the Attorney General as the successor to the Alien Property Custodian.

Although lack of jurisdiction was the sole ground of the motion, it was not based on the record which was not even made a part of the moving papers. It was based entirely on an affidavit of an attorney employed in the Department of Justice who did not pretend to have any knowledge of the facts and whose inferences were drawn from evidentiary matter entirely *dehors* the record and in large part relating to events which transpired subsequent to the 1929 decree (R. 7, *et seq.*). The Respondent produced the record in opposition to the motion (R. 318-352).

The truth is that the attack upon the judgment was really on a pretense of fraud in procuring it and that attack was sustained by the District Court with the statement in its opinion "that Sorenson and Nielsen were collusively made parties plaintiff for the purpose of creating a case cognizable under the Trading with the Enemy Act." (R. 1089.)

Judge GODDARD did not so much as intimate in his opinion that the Respondent was a party to any collusion and there is nothing whatever in the two-volume record to show that it was. The Petitoner's predecessor did claim that the plaintiffs' attorney, Avery, had made a pre-trial agreement in Germany with Z.E.G. to divide the recovery. Mr. Avery stoutly denied that (R. 382-383). And his denial was fully supported by the minutes of Mr. Martin, counsel for the American Agent before the Mixed Claims

Commission, and the correspondence between him and Mr. Avery, showing that the negotiations over settlement were made in Mr. Martin's office in his presence after the entry of the decree of 1929, and that the compromise was of an extraneous claim of Z.E.G. not involved in the suit (R. 24, 25, 998-999). The Petitioner in a footnote, conceding that the question of collusion on which Judge GODDARD decided the motion is not here, says "the case will be discussed as though Sielcken's Executor had made no agreement with them to share the proceeds of recovery." (brief, p. 15.)

We shall discuss the case as though the learned Solicitor General were not the author of that and similar admittedly irrelevant insinuations throughout the brief, and we find it difficult to believe that he is the author of them.

Of course, the Circuit Court of Appeals held that a decree could not "be set aside, on the ground of fraud, nine years after it was rendered" on a motion made on affidavits (R. 1125), particularly as Judge AUGUSTUS N. HAND speaking for the Circuit Court of Appeals observed (R. 1126) "where the affidavits proved to be contradictory in respect of important issues," and although the Petitioner says in the footnote on page 7 that the "affidavits and documents disclose substantial evidence of collusion and possibly of fraud," the Petitoner does not ask for a review of that ruling, but says at the conclusion of the footnote on page 9: "This holding of the court below is not now before this Court for review."

The motion was directed only to the Chase Bank as Ancillary Executor of the plaintiff Nielsen and the plaintiff Sorenson (R. 6). Service of the motion papers on the Chase Bank was set aside by order of June 15, 1938, on a

motion in which the Petitioner joined (R. 295). The defendants Treasurer and Z.E.G. were not parties to the motion and did not appear on the motion.

It results that one of the plaintiffs, or his Executor, and two of the defendants are not parties to the motion to vacate the decree entered in the action after a trial in which all participated.

The charge of fraud and collusion on which the District Court really decided the motion is abandoned, except for the footnote references for atmosphere.

Without issues framed or a trial of them, without the production of witnesses or any opportunity for cross-examination, without findings of a trial court, this Court is asked to find from a two-volume record of conflicting inferences and statements supported by affidavit alone that Sielcken, who died before the suit was brought and whose Estate was not a party to the suit, was, in fact, an enemy, and that he was the owner of the claim, and on such basis, to set aside a nine-year old decree on the ground that the District Court did not even have jurisdiction to determine the truth of the averments of the bill of complaint.

In fact, the Petitioner seeks a retrial on affidavit of issues which the Respondent insists and the Court below found were once actually litigated and adjudged between adversary parties, including the Petitioner's predecessor.

Summary of Argument.

POINT I—Though the Petitioner must fail irrespective of whether the attack is a collateral one or by direct review, this is an independent proceeding, not a direct review as the Petitioner is driven to contend. It is not a substitute for a bill of review for fraud or newly discovered evidence.

That it cannot be a direct review is manifest from the fact that it is based not on the record, but on matters *dehors* the record. Such matters could properly be considered only [redacted] by bill for review either for fraud or newly discovered evidence.

Three of the five parties to the suit are not even parties to this proceeding by motion.

POINT II—The statute plainly conferred jurisdiction on the District Courts to entertain precisely such suits as that resulting in the decree of December 30, 1929.

The Petitioner concedes that the suit was brought under the Trading with the Enemy Act.

It is now undisputed that the bill of complaint alleged every fact essential to state a case under that Act.

The defendants all appeared generally.

The plaintiffs were not only alleged and adjudged to be, but, as a matter of undisputed fact even now, were within the class authorized to bring suit under the statute. They made a claim entitling them to the relief afforded by the statute. The District Court had jurisdiction to adjudge that claim.

POINT III—Every fact and every question of law upon which the jurisdiction of the Court depended was in issue and necessarily determined by the decree.

There is no longer any question but that all the so-called quasi-jurisdictional facts were pleaded.

It is not disputed that all were put in issue or admitted.

When there is statutory authority for a particular class of suits against the United States or an officer of the United States, they are in the same case as any other litigant and entitled to but one trial of a contested issue.

All of the cases cited by the Petitioner dealing with the facts upon which jurisdiction of the particular case depended, which, of course, have to appear by pleading or proof, arose on direct appeal from the judgment attacked.

POINT IV—There is no question of immunity in the case.

That is settled by the admission that the suit was brought under the statute and it is not denied that the bill of complaint stated a case under the statute.

POINT V—The recent decision of this Court in United States v. United States Fidelity & Guaranty Company (309 U. S. 506) has no application to this case.

POINT VI—Although strictly the question of res adjudicata is not involved, the petitioner is concluded by the decree on the very matters on which he assails the jurisdiction of the Court to render it.

The Petitioner ignores the issues raised by the pleadings, the questions raised by motions, the formal rulings

and the decree, and quotes from a selected colloquy, in which no ruling was made, to show what was litigated. The very colloquy selected and the Petitioner's quotations from it show that the allegations of fact now made by the Petitioner were likewise pressed by the defendants' counsel at the trial.

In fact, in this case the rule is applicable that the decree is conclusive not only on the questions actually raised, but on all that might have been raised. However, every question that could have been raised was, in fact, raised either by pleading or motion. It was not necessary to label those questions as jurisdictional.

ARGUMENT.

POINT I.

Though the Petitioner must fail irrespective of whether the attack is a collateral one or by direct review, this is an independent proceeding, not a direct review as the petitioner is driven to contend. It is not a substitute for a bill of review for fraud or newly discovered evidence.

While the point is of minor importance because the motion was equally untenable whether the attack on the judgment be deemed direct or collateral we briefly discuss it in order to dispose of it, so that the Court will more readily appreciate the nature of the claim that the Petitioner is trying to assert.

It is an independent proceeding.

Stevirmac Oil & Gas Co. v. *Dittman*, 245 U. S. 210.

Phillips v. *Negley*, 117 U. S. 665.

That it cannot be a direct review is manifest from the fact that it is not based on the record and from the further fact that some of the parties to the suit are not parties to the motion.

The Circuit Court of Appeals ruled that the attack on the judgment was a collateral one (R. 1123) and that ruling has not been assigned as error or brought here for review.

The cases cited by the Petitioner in support of his proposition that it is a direct review (*Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 495-496; *Cohen* v. *Portland Lodge*, 152 Fed. 357) do not sustain it.

In the former case (p. 495) Mr. Justice VAN DEVANTER, speaking for the Court, said that had the parties objecting to the authority of the Judge appeared in the suit and raised the question, "they would have been entitled to appeal. In thus seeking a correction of errors claimed to have been committed in continuing the receiverships, they would have been engaged in a direct attack," and, in referring to the fact that the attack was collateral, observed:

> "And, this being so, there was need for heeding the familiar rule that such an attack can be successful only where and to the extent that it discloses a want of power as distinguished from error in the exertion of power that was possessed."

Freeman does in one place say that the doctrine of "conclusive adjudication" does not apply "to proceedings which constitute a direct attack upon the former adjudication".

2 FREEMAN ON JUDGMENTS, Sec. 627, p. 1324.

But in the immediately following section—627 (a)—he says:

> "The effect of an adjudication as *res adjudicata* is not confined in its operation to subsequent independent actions or proceedings, but is equally applicable to all ancillary or collateral proceedings in the same suit, action or general proceeding."

And in 1 FREEMAN ON JUDGMENTS, Sec. 306, p. 608, we find this:

> "Many decisions emphasize as a feature of collateral attack its attempt to step outside the record of the former judgment; the rule of such decisions is that any effort to impeach a judgment in a prior action or proceeding is collateral when it is based on allegations of facts not apparent on the face of the record, but wholly dehors the record."

Though entitled in the action, this was an independent proceeding to set aside a judgment, not because it appeared on the face of the record that it was a nullity, which is not even contended, but on allegations of facts "wholly dehors the record".

If fraud touching some matter extrinsic to the issues or newly discovered evidence is claimed, a bill of review, if seasonably brought with reasonable diligence, might have been entertained. The reasons why the Petitioner or his predecessor did not resort to that remedy are obvious. He cannot avoid the difficulties he would encounter in such a suit by the unheard of method of seeking a retrial on affidavits.

The ruling of the Circuit Court of Appeals that an issue of fraud cannot be tried on conflicting affidavits, no longer

even questioned by the Petitioner, applies with equal force to the effort to retry any issue of fact on affidavits. If newly discovered evidence is timely asserted with proper diligence, a new trial of an issue of fact may be had, but not on affidavits. This is not a suit or a proceeding to obtain a new trial on the ground of newly discovered evidence. It distinctly sought to avoid a new trial and to have the original bill dismissed without opportunity for a new trial.

Under Rule 59 of the Rules of Civil Procedure for the District Courts, adopted pursuant to the Act of June 19, 1934, Ch. 651 (28 U. S. C. 723b, 723c), a motion for a new trial may now be made on the ground of newly discovered evidence. This is not such a motion. It was made before the effective date of the rule and not in conformity with it.

It may be assumed that a mere nullity may be expunged from the record at any time, and it matters little how, whether by motion or otherwise; but that cannot be done merely because the Court committed error in the decision of a question which was properly before it for decision.

In re Metropolitan Trust Co., 218 U. S. 312, 321.

POINT II.

The statute plainly conferred jurisdiction on the District Courts to entertain precisely such suits as that resulting in the decree of December 30, 1929.

The Petitioner concedes (p. 3 of his brief) that the suit was brought "under Section 9 (a) of the Trading with the Enemy Act"; and he has abandoned the question

raised in the suit at the very outset by the defendants Custodian and Treasurer that the bill of complaint had not stated facts "sufficient to entitle them to equitable relief under the Trading with the Enemy Act." (R. 338), quite obviously because the District Court had jurisdiction to pass on that question and properly decided it.

Overlooking the first paragraph of the bill of complaint, Judge GODDARD, who granted the motion to vacate the decree, thought that the bill failed to allege the residence of the partners (R. 1081). Even if he had been right about that, he had no power on a motion, nine years after the decree, to reverse the ruling of the court which rendered the decree.

But the bill did allege that the plaintiffs were and at all times had been citizens and residents of the United States, and though that averment was put in issue by mere denials of knowledge, it has never been claimed, and there is no claim even now, that it was not true.

The statute authorized any person not an enemy or ally of enemy—["person" being defined as "an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic", and "enemy" or "ally of enemy" being defined as "any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war" or "of any nation which is an ally of a nation with which the United States is at war"]—"*claiming* any interest, right or title in any money or other property" transferred to or seized by the Alien Property Custodian, "or to

whom any debt may be owing from an enemy or ally of enemy" whose property had been so transferred or seized, to "institute a suit in equity * * * *to establish* the interest, right, title, or debt *so claimed*," and "if so established" for a direction to the Custodian and Treasurer to pay the same to *said claimant*. (Italics ours.)

There is no question even now but that the plaintiffs were within the class authorized to bring suit, and there can be no question that they claimed that a debt was owing to them by an enemy whose property had been seized by the Alien Property Custodian, and, indeed, the decree vacated by the District Court expressly adjudged that the debt was owing to them.

By appropriate denials of any knowledge (R. 338-339) the Custodian and Treasurer put in issue the status of the plaintiffs, the deceased partner Sielcken, and the partnership itself, the continuance of the partnership until Sielcken's death, the existence of the debt and the plaintiffs' right to recover it, and Z.E.G. in addition to similar denials affirmatively alleged that no debt was owing to the plaintiffs, that Sielcken became an alien enemy on the outbreak of the war, and that the firm of Crossman & Sielcken was thereby dissolved (R. 326-329).

At the close of the plaintiffs' case the Custodian and Treasurer moved, and, at the conclusion of the evidence, all the defendants moved, for a dismissal for failure to prove a case, and took exceptions to the denial of the motions (R. 834, 863).

The Petitioner appears to think that the Respondent has raised a novel and even uncertain doctrine in urging

that the District Court had jurisdiction of the "class of cases to which the one to be adjudged belongs." (Brief, p. 41). The doctrine and even the phrase are familiar to this Court.

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in a given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue."
>
> *Reynolds* v. *Stockton*, 140 U. S. 254, 268.

> "Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power."
>
> *United States* v. *Ness*, 230 Fed. 950, 953.

> "It is the power to act upon the general, and so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power."
>
> *Hunt* v. *Hunt*, 72 N. Y. 217, 230; appeal dismissed 131 U. S. Appendix clxv; 24 L. Ed. 1109.

> "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."
>
> *Cooper* v. *Reynolds*, 10 Wall. 308, 316.

There is a plain distinction between jurisdiction of the subject matter, an abstract question, and the power to determine the facts upon which jurisdiction in a particular case depends, a concrete question. Want of the former stops the inquiry at the very threshold of the court; a decision as to the latter is the exercise of jurisdiction and is the first step to be taken in such exercise of jurisdiction.

Appeal is the method provided for the correction of errors in the exercise of such jurisdiction and, except on appeal, it is immaterial whether the court erred or not since "the test of jurisdiction is the right to decide, not right decision." (*Phebus* v. *Search*, 264 Fed. 407, 411).

Or, as put by this Court over a century ago:

> "The power to hear and determine a cause is jurisdiction; it is '*coram judice*' whenever a case is presented which brings this power into action; if the petitioner states such a case in this petition that on a demurrer the Court would render judgment in his favor, it is an undoubted case of jurisdiction, whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law."
>
> *United States* v. *Arredondo*, 6 Peters 691, 709.

The Petitioner now says that regardless of what was in issue, and what was either expressly or necessarily decided by the decree, the District Court was without jurisdiction, because, as a matter of fact now attempted to be shown by extrinsic evidence, Sielcken was the owner of the claim and was a resident of Germany. Even if the

latter fact were now to be deemed established by affidavit, it would not affect the jurisdiction of the Court.

Indeed, even if the bill of complaint instead of alleging as it did that Sielcken had at all times been a citizen and resident of the United States had expressly alleged that he was a resident of Germany, the court would still have had jurisdiction to entertain the suit. That was decided by the very cases cited by the Petitioner (p. 22).

Mayer v. *Garvin*, 278 Fed. 27; 270 Fed. 229.
Sutherland v. *Mayer*, 271 U. S. 272

The Petitioner cites those cases as authority for the proposition that "a non-enemy partner of an enemy partnership had a right to recover from the Custodian his share of the seized partnership assets" (Brief, p. 22).

They do not support his proposition. On the contrary they decided that the non-enemy partner could maintain an action under Section 9 (a) of the Trading with the Enemy Act to recover *all* the firm property so seized, being accountable *after such recovery* to the Alien Property Custodian for the interests of the German partners.

The subject was considered by this Court in *Sutherland* v. *Mayer*, which was the accounting suit brought after the recovery of the property and the termination of the war.

The recovery of a debt owing by a debtor whose property had been seized by the Alien Property Custodian would necessarily stand on the same basis. The persons entitled to share in the recovery and their respective interests were matters to be determined in a proper accounting suit subsequent to recovery.

The plaintiffs claimed that each was personally entitled to 12½% of the recovery. That was not a matter

to be litigated in the suit to recover the debt. Later the plaintiff Sorenson and the representative of Nielsen pressed their respective claims for three years in the subsequent New York litigation. The result of that suit certainly did not and could not affect the jurisdiction of the District Court to entertain the suit resulting in the 1929 decree. Moreover, there were other claims which on their face amounted to 60% of the recovery, as stated *supra,* page 19.

The plaintiffs were, of course, personally liable for the firm debts, but apart from their personal liability, they had the right, and it was their duty, whether as surviving or liquidating partners, to collect the debts owing to the firm for the purpose of paying the debts of the firm, if for no other purpose. This was the construction already then placed on the terms of the partnership articles by the court in which the recovery was had. In 1918 shortly after the Respondent qualified as executor it wrote the plaintiffs requesting them "to institute such litigation as may be necessary or advisable for the collection of the obligations due the firm of Crossman & Sielcken in your names as surviving partners" (R. 353).

The New York Supreme Court action being an accounting for the proceeds of the 1929 decree was the suit in which the Alien Property Custodian might have asserted his right to Sielcken's interest if he claimed any such right. But he had long before abandoned any such claim.

But in any case, the District Court had in 1929 jurisdiction to construe the statute, to decide whether the complaint stated a case within the statute, and whether the evidence supported the case as stated, to decide whether the plaintiffs were in fact citizens and residents of the United States as they alleged, now undisputed, whether

Sielcken was a citizen and resident of the United States as alleged, and whether the partnership of Crossman & Sielcken continued right up to the death of Sielcken in October, 1917.

If it is now open to the Petitioner to retry the case on affidavits and to show, that, contrary to the express adjudication of the decree, the plaintiffs had no title to the claim and no right to sue on it or, contrary to the averments of the bill of complaint, that Sielcken was in fact a resident of Germany and that the partnership was for that reason dissolved on our entry into the war, no decree against the United States would ever have finality.

The Petitioner is in error in asserting (p. 18) that the Respondent's "fundamental assumption" is "that for purposes of the act a partnership may be treated as a separate entity." We make no such assumption. On the contrary we assume that actual enemy status of one partner would have the effect of dissolving the partnership. However, the statute, by Sec. 2 as above (pp. 3-4) does treat a partnership as an entity to the extent of having a residence, and by paragraph 2 of the bill of complaint as above it was alleged that the partnership had always had its place of business in and been a resident of the Borough of Manhattan, State of New York, and was not and never had been an enemy or ally of enemy.

Our reliance is upon a fact, not an assumption, and not even an averment of fact adjudged by the decree to be a fact, though that would suffice. It is upon the undisputed fact alleged in the first paragraph of the bill that the plaintiffs were and at all times had been citizens and residents of the United States and themselves claimed the right to recover the debt, as the creditors of Z.E.G.

POINT III.

Every fact and every question of law upon which the jurisdiction of the Court depended was in issue and necessarily determined by the decree.

It was necessarily adjudged by the decree and is now an undisputed fact that Sorenson and Nielsen were American citizens and residents of the United States. They were entitled to assert a claim under the statute. They did assert a claim under the statute, and it was for the District Court to adjudicate it.

The statute in express terms recognizes the right of claimants to bring suit. The plaintiffs were claimants. Moreover, a consent to be sued is necessarily a consent that disputed questions both of fact and law may be litigated and finally decided. The very fact that rights are to be determined by suit implies contested issues. In this instance, every contested issue must be deemed to have been decided by Judge CAFFEY in favor of the plaintiffs, and every fact alleged was either admitted or put in issue and tried and determined in 1929.

The Petitoner's contention seems to be that the United States consents to be sued only by plaintiffs who are entitled to maintain the suit, and that no matter what may be in issue and decided in the suit, it is always open to the United States to show even by affidavit that the plaintiffs were not entitled to maintain the suit.

Error in the decision of any matter of fact or law, even of the facts on which jurisdiction of the particular case depends does not deprive the court of jurisdiction and is to be corrected only on direct review on appeal.

In re Metropolitan Trust Co., 218 U. S. 312.

That is the way the question came before the Court in every one of the many cases cited on pages 25 and 26 of the Petitioner's brief.

Of course, the facts on which jurisdiction depends must appear by pleading or proof. If they do not or if the trial court errs in the decision of them, the court on appeal will reverse. That is precisely what those cases stand for and all they stand for.

In the exercise of jurisdiction, the court must determine the facts upon which jurisdiction depends, and, of course, if error is committed either in construing the statute or the pleadings or in determining the probative effect of evidence, such error can be corrected on appeal. It does not deprive the court of jurisdiction.

When there is statutory authority for a suit against the United States or an officer of the United States they are in the same position as any other litigant.

In the much quoted case of *United States* v. *Arredondo* (6 Pet. 691), the question arose whether pursuant to the statute authorizing the proceeding the court had jurisdiction of it. This court said:

"The superior court of Florida then had jurisdiction of the petition, to hear and determine the same, according to the principles of justice and the laws and ordinances of Spain; and the case is now regularly before us, on an appeal from their decree. The power to hear and determine a cause is jurisdiction; it is '*coram judice*,' whenever a case is presented which brings this power into action; if the petitioner states such a case in this petition, that on a demurrer, the court would render judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and

putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law." (*Id.* 709)

In *United States* v. *Throckmorton* (98 U. S. 61), it was held that the fraud which would support an attack on a judgment or decree against the United States must be a fraud in some matter extrinsic to the issues involved, and that even perjury or the forgery of evidence would not suffice. The United States had only the same remedies as any other party.

In a *qui tam* action in the name of the United States to recover a sum of money received from the United States pursuant to an unappealed judgment of the Court of Claims on the ground that the claim was in fact fraudulent, the Supreme Court of the District of Columbia, following the rule laid down in the *Throckmorton* case and in *Cromwell* v. *County of Sac* (94 U. S. 351), held the judgment of the Court of Claims a bar because there was no averment of fraud or conspiracy that could not have been determined by way of defense in the former action.

United States, ex rel. McManus v. *Moore, et al.*, 3 MacArthur 226.

In *Meigs* v. *United States* (20 Court of Claims 181), the following was said by the Court of Claims on the subject of the binding effect of judgments against the United States, *viz.*:

"In our opinion the defendants are estopped from setting up, either here or in the Treasury Department, any defenses against the claimant's demand for services

as supervising engineer and architect of the Pension Bureau which were raised, litigated and determined in the former action between the same parties. They have had their day in court, they have submitted their defenses to a court of competent jurisdiction, and the issue has been decided against them. That issue is forever settled between the parties in all future litigation. Such is the well-settled law between citizens, as decided by the Supreme Court in elaborately considered cases. (*Beloit* v. *Morgan*, 7 Wall. 619; *Cromwell* v. *County of Sac*, 94 U. S. R. 351; *United States* v. *Nourse*, 9 Pet. 8.) *Interest reipublicae ut sit finis litium.*

"The judgment of this court might have been reviewed by the Supreme Court had the Attorney-General so elected. But he abandoned an appeal at the request, it is understood, of both the Secretary of the Interior and the Secretary of the Treasury, and his action is the action of the defendants. (*United States* v. *Babbitt*, 104 U. S. R., 767.)

"The accounting officers of the Treasury should have followed that decision in the future settlement of the claimant's accounts, because the United States are estopped from further controverting the issues adjudicated by the judgment of this court."

In a case involving the authority of a commission of the United States and its binding effect in a subsequent suit to which another officer of the United States was a party, this Court recently held that there was privity and observed, referring to earlier decisions, "As held in those cases, in general the principles of *res adjudicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or the parties."

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381.

In the suit here in question every question that could possibly be raised was raised. Every fact on which the power of the Court to entertain the particular suit depended was put in issue.

There is no reason why the United States or an officer of the United States should have more than one trial of an issue. And it is now settled law that one trial is enough.

Stoll v. *Gottlieb*, 305 U. S. 165;
Treinies v. *Sunshine Mining Co., et al.*, 308 U. S. 66;
Chicot County Dist. v. *Bank*, 308 U. S. 371;
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381;
Baldwin v. *Travelling Men's Ass'n.*, 283 U. S. 522.

The cases relied upon by the Petitioner holding that the Court in some particular case was without jurisdiction only serve to emphasize the distinction between jurisdiction of the class of cases to which the one to be adjudged belongs and power to decide the alleged facts upon which the jurisdiction invoked in a particular case depends.

In *Vallely* v. *Northern Fire & M. Ins. Co.*, 254 U. S. 348, an insurance company was adjudged an involuntary bankrupt by default on a petition of creditors which alleged that it was an insurance company and engaged in that business, although the statute conferring jurisdiction on the bankruptcy court expressly excepted insurance companies from its operation.

That case would be in point here if the bill of complaint had alleged that the plaintiffs had been residents of Ger-

many and if the defendants had defaulted. In that case, the court would have had no jurisdiction even to inquire into the facts.

Mr. Justice REED distinguished the *Vallely* case in *Stoll* v. *Gottlieb* at page 176 on the ground, among others, that there was "not an actually contested issue and order as to jurisdiction."

In the instant case, the bill alleged the American citizenship and residence at all times of the plaintiffs and of the deceased partner Sielcken as well up to the time of his death, and that the partnership continued until his death. It alleged a debt owing to the plaintiffs as surviving partners by Z.E.G.

Those allegations were put in issue by appropriate denials by all the defendants and it was specifically alleged by the defendant Z.E.G. in its answer that Sielcken was a resident of Germany upon the outbreak of the war and that no debt was owing to the plaintiffs (R. 329). Those were the typical issues likely to arise in such a suit. The United States necessarily consented to the trial of such issues when it conferre jurisdiction of such suits on the District Court.

In *Kalb* v. *Feuerstein*, 308 U. S. 433, a state court proceeded in foreclosure proceedings after it had been divested of jurisdiction by the second Frazier-Lempke Act. What the Petitioner calls a "policy favoring the finality of judgments" was not overridden in that case, as the Petitioner says (p. 36), by any "countervailing policy." There is no question here as to overriding one policy by another, i. e., the finality of judgments by sovereign im-

munity. If there be no statutory authority for a suit against the United States, there is no finality to a judgment rendered therein. But if there is statutory authority for such a suit as is brought, there is jurisdiction to decide every issue properly arising therein, including the facts upon which the jurisdiction to adjudge the particular case depends.

There is no question of one policy countervailing another, as the Petitioner supposes, and if there were, the law would be in a sad state.

In *United States* v. *Ickes,* 84 Fed. (2d) 257, the District Court assumed to review a decision of the Secretary of the Interior concededly never made, on a claim concededly never presented,—this under a statute giving a limited power of review on the law of the decision of an administrative officer and the case arose even after the time to present the claim to the Secretary of the Interior had expired.

United States v. *United States Fidelity & Guaranty Company,* the case chiefly relied on by the Petitioner, will be discussed under a separate point.

The Petitioner's argument would have point if no such statute as the Trading with the Enemy Act had ever been passed. Then, of course, the Custodian and Treasurer could not have waived immunity by appearing with or without objection.

In none of the above cases was there any occasion for any inquiry into facts upon which jurisdiction depended. The inquiry was stopped right at the threshold by matters of record—in one case, a court clothed with limited power

of review on the law was asked to review a decision of an administrative officer concededly never made; in another, a state court had been divested of jurisdiction by a federal statute; in another, a court was asked to adjudicate a cross-claim against the United States without the slightest statutory authority to do so; and in the other, a court was asked to adjudge an insurance company insolvent under a statute expressly exempting insurance companies from its operation.

The Petitioner says (p. 28): "At the trial the defendants claimed that Sielcken was a resident of Germany at the time of the war, that he owned all the capital of the partnership, and that upon his death, it was the duty of the surviving partners to pay over to his executors the capital, property and business of the firm," but says that "it was never even remotely suggested that these facts raised a jurisdictional issue."

Yet he now claims that, solely by reason of those facts, the Court was without jurisdiction even to determine the claims so made and urged at the trial.

The Petitioner says (p. 31) that the express adjudication that Z.E.G. "is indebted to the plaintiffs" is only determination that it was indebted to the partnership. But the plaintiffs were Sorenson and Nielsen as surviving partners, and their title to the firm assets and right to sue recover debts owing it were concededly in issue and actually litigated, as above.

The Petitioner goes so far as to claim (pp. 32-33) that the matters in issue and decided by the decree are not to determined from the pleadings and decree, citing a

sentence from 2 FREEMAN ON JUDGMENTS, § 689, p. 1455, which, as we show *infra* (p. 51), was written on the question whether an adjudication of an isolated fact in one action was conclusive in a different action on a different claim, and also citing *Cromwell* v. *County of Sac,* (94 U. S. 351), which, as shown by the headnote quoted on p. 52, *infra,* decided that a judgment in one action when brought in question in a second action on the same claim or demand "is a finality as to the claim or demand in controversy, concluding parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Finally, the Petitioner makes the extraordinary claim (p. 34) that the Government showed that it did not intend to raise any jurisdictional issue by saying in answer to the plaintiffs' averment that the bill was "filed pursuant to the provisions of Section 9 of the Trading with the Enemy Act," (R. 320) and that "this Court has jurisdiction to entertain the same," that said allegations were "statements of law which these defendants are not required to answer." (R. 329.)

We have always supposed that that was an appropriate way to challenge a mere conclusion of law. It would not have been admitted, though nothing was said about it in the answer. So far from showing an intention not to raise any jurisdictional question the answer of the defendants Custodian and Treasurer gave notice, though it was unnecessary, that they did intend to raise that question. The motion to dismiss on the ground that the bill

had not stated facts entitling the plaintiffs to equitable relief under the statute, likewise gave such notice. It was not necessary to use the word "jurisdiction", as the Petitioner seems to think.

The observation of the Circuit Court of Appeals on this point is pertinent:

> "The case at bar falls clearly within the rule of *Stoll* v. *Gottlieb* and of the *Chicot County* decision. Not only was there every opportunity to present the matters now relied on by the government in the trial before Judge CAFFEY, but those matters were expressly raised and argued before him. It is true that it was not argued to Judge CAFFEY that the material facts were 'jurisdictional'; but it was urged that the plaintiffs had no right to sue under the Trading with the Enemy Act—which is the very issue of jurisdiction which is now before this court. Apart from the failure to use the word 'jurisdiction' the parties to the previous trial could scarcely have raised the issue of right to sue more squarely. The answer of Z.E.G. alleged that title to the claim was held by the Custodian and that the German firm of Wille & Company had a half interest in the claim. In oral argument before Judge CAFFEY, dismissal of the action was asked by counsel for the government on the ground that Sielcken was an enemy under the Act.
>
> "The issues thus raised are the same issues which are pertinent on the 'jurisdictional' question of right to sue under the Trading with the Enemy Act. Even if Judge CAFFEY was wrong in deciding these issues in favor of the plaintiffs the government should have taken an appeal from his decision if it wished to question it further." (R. 1124.)

POINT IV.

There is No Question of Immunity in the Case.

That is settled by the Petitioner's admission that this suit was brought under Section 9 (a) of the Trading with the Enemy Act.

It is settled by the bill of complaint which, as is now undisputed, alleged every fact on which the jurisdiction of the Court depended, the performance of all the conditions precedent to suit prescribed by the statute, and specifically, though that was unnecessary, that the suit was brought pursuant to the Trading with the Enemy Act.

Even if there had been a defect in pleading, (and the defendants Custodian and Treasurer asserted by motion to dismiss the bill that it was insufficient to entitle the plaintiffs to equitable relief under the statute), the unreversed decision of the Trial Court on the point would have been conclusive.

Having authorized precisely such a suit as was brought, the Congress consented that it be prosecuted according to the principles of justice, the laws of this land, and established judicial procedure.

The decision of the question whether the plaintiffs made out the case alleged was certainly the exercise of the jurisdiction conferred by the statute.

United States v. *Arredondo,* 6 Pet. 691.

Undoubtedly the authority of the United States to the bringing of suit and to the District Courts to entertain jurisdiction of it was necessary. We do not claim that such

authority could be conferred by officials either expressly or by failure to object. It had to be given by the Congress of the United States. It was given by the Congress of the United States, and, of course, that authority conferred jurisdiction upon the District Court to make a decision in favor of either party which would be an adjudication binding upon the other. Precisely this is the case in every exercise of jurisdiction.

The concession by the Petitioner that the suit was brought under Section 9 (a) of the Trading with the Enemy Act disposes of the question of immunity.

The Petitioner says (p. 41) that "it is the fact of, and not the reason for, the sovereign's lack of consent, which is fatal to the jurisdiction of the Court." That may be assumed. He also says in that connection that the United States has not authorized suits against it by enemies, and that that lack of consent in the instant case is the same as the lack of consent that a suit against the United States be prosecuted by means of a counterclaim in the *United States Fidelity & Guaranty Company* case.

But in that case there was no statutory authority to entertain the claim presented. In the instant case there was statutory authority for precisely such a suit as was brought by the plaintiffs Sorenson and Nielsen. They had to allege the facts which entitled them to sue under the statute. There is no question here but that they did allege such facts. Some of them were put in issue. The decision of each and every one of them was the exercise of a jurisdiction conferred by the statute. And it so happens that it is now undisputed that the plaintiffs were not enemies and were entitled to bring suit under the statute. Surely, the

Court had jurisdiction to decide whether they had a good cause of action and that depended in part on whether they had title to the debt sought to be established, as the trial court specifically found.

There is no question here as to which of two conflicting policies should override the other, as the Petitioner maintains. The doctrine of immunity is not a policy. Immunity from suit without consent is an inherent right of sovereignty. The doctrine of the finality of judicial decrees is not a policy—it is a rule of law maintained throughout our history. That rule of law and that right never conflict, and do not conflict here. They never operate in the same field. If the right of immunity has not been yielded in a particular field, no judgment or decree in that field has any force or effect whatsoever. That question depends on the absence or existence of a statute authorizing the suit. It does not depend on issuable facts.

As shown under the preceding point, in each of the cases holding that the Court had no jurisdiction cited and relied on by the Petitioner, either there was no statutory authority at all, or a state court was divested of jurisdiction by a federal statute.

POINT V.

The recent decision of this Court in *United States v. United States Fidelity & Guaranty Company* (309 U. S. 506) has no application to this case.

In that case, there was no statutory authority whatever for the Court, whose jurisdiction was later challenged, to entertain a suit or grant a judgment on a cross-claim against the United States as trustee for the Indian Nations,

nd it was held that immunity could not be waived by fficers of the United States by appearing and not objecting to an exercise of jurisdiction never conferred.

Of course, the immunity of the United States from suit an only be waived by act of the Congress. The Trading ith the Enemy Act conferred jurisdiction on the District ourts to entertain precisely such suits as the one here involved. It is now undisputed that the plaintiffs were within he class authorized to bring suit and it is further undisuted that the bill of complaint alleged every fact essenal to the exercise of jurisdiction by the Court and that ose facts so alleged were either admitted or put in issue the defendants who appeared generally.

The issues so raised were tried and adjudged by the ourt's decree either expressly or by necessary implication, d the officers of the United States accepted the adjudicaon and paid the judgment.

POINT VI.

Although strictly the question of *res adjudicata* is t involved, the petitioner is concluded by the decree the very matters on which he seeks to assail the risdiction of the Court to render it.

The Petitioner's effort to show, not by express rulings t by reference to colloquies occurring during the trial, t no issue as to the plaintiffs' ownership of and right to e on the claim was litigated or decided is completely met the express adjudication in the decree that Z.E.G. was lebted to the plaintiffs in the sums stated (R. 351-352),

after their right to maintain the suit had been put in issue and contested on the trial. (R. 806-807.)

His effort to make it appear that the express averment of Z.E.G. that Sielcken was an enemy and that the firm of Crossman & Sielcken was dissolved on the outbreak of the war, and that Sielcken owned the assets of the firm which passed to his German Executors was only collaterally involved in and not necessarily determined by the decision of the issue as to the binding effect of the German arbitration, completely disregards the fifth, separate and distinct defense of Z.E.G., and the express averment of the bill that Sielcken was a citizen and resident of the United States up to the time of his death and that the partnership of Crossman & Sielcken was continued right up to that time, which was put in issue by the Petitioner's predecessor and the defendant Treasurer (R. 324-326), as well as by Z.E.G. (R. 338-339). It also disregards the fact that the decision that the German arbitration was without force or effect was absolutely dependent on the finding that the plaintiffs, and not Sielcken's German Executors, owned the claim.

On a review by appeal, the Appellate Court searches the record to determine whether errors were committed, whether the issues were properly presented, whether the evidence supports the claims in issue of the prevailing party, and whether the judgment conforms to the proof and the issues. But if judicial decrees are ever to have finality, it can never be open to a defeated litigant to retry the issues on affidavits.

The Petitioner appears to think that on such a motion as this the Court may determine what was at issue and necessarily decided, not from the pleadings, formal rulings and decree, but from colloquies between court and counsel.

during the trial, which at most would only serve to shed some light on rulings actually made if under direct review.

The Petitioner quotes (brief, p. 32) FREEMAN ON JUDGMENTS (5th Ed.), § 689, p. 1455, to the effect that "It is not enough that a matter was in issue, but it must clearly appear to have been adjudicated." That quotation is from a section dealing with the question whether an adjudication of one cause of action is conclusive in a suit on a different cause of action. The Petitioner omits what immediately precedes the quotation. We supply it:

> "Except as they are necessarily involved,, matters as to which no issue was made are not concluded even though within the general scope of the litigation and even though they might have been adjudicated had they been put in issue. In order that a judgment may be an estoppel as to a particular matter, it must appear either upon the face of the record or by extrinsic evidence, that the same matter was in issue and determined in the previous action."

The question here does not arise in a suit involving another or different cause of action. It arises on a motion to vacate the very decree assailed, and it does not matter for that purpose whether the motion be regarded as having been made in the action or as the separate and independent proceeding it really is.

As to the effect of such a decree when subsequently attacked, Freeman has this to say:

> "The effect of a judgment as *res judicata* is not limited nor enlarged by the reasons given by the court for its rendition, nor by the failure of the court to give its reasons in writing on every point when required to do so by the constitution of the state.

Except in so far as this may be done by the character and scope of the judgment itself, a court has no authority by recitals in its judgment to prescribe or limit its effect as *res judicata* in subsequent litigation."

2 FREEMAN ON JUDGMENTS, § 670, p. 1414.

Each of the cases cited by the Petitioner on pages 32 and 33 of his brief to support his claim that it must clearly appear that the decision was actually based on the particular question subsequently arising emphasizes the distinction which the Petitioner fails to note between a second action on the same claim or demand and one upon a different claim or cause of action. It is well stated in the headnote to the leading case cited by him thus:

"1. The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, stated. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

Cromwell v. *County of Sac*, 94 U. S. 351.

In the present case, the plaintiffs' ownership and right o sue on the claim was expressly adjudicated by the decree. The deceased partner's American residence and domicile were in issue, and were necessarily adjudicated by the decree, though it was silent on the subject.

In this case, there was jurisdiction of the persons. The defendants all appeared generally. There was jurisdiction of cases brought under the Trading with the Enemy Act. That is conceded.

In that situation the parties were bound not only n every question that actually was raised and decided, ut also on every question that might have been raised and ecided, including so-called quasi-jurisdictional facts.

Chicot County Dist. v. *Bank,* 308 U. S. 371, and cases cited by Mr. Chief Justice HUGHES (pp. 376-7), namely the following:

M'Cormick v. *Sullivant,* 10 Wheat. 192, 193;

Skillern's Executors v. *May's Executors,* 6 Cranch 267;

Des Moines Nav. Co. v. *Iowa Homestead Co.,* 123 U. S. 552, 557, 559;

Dowell v. *Appelgate,* 152 U. S. 327, 340;

Evers v. *Watson,* 156 U. S. 527, 533;

Cutler v. *Huston,* 158 U. S. 423, 430, 431.

Every question that could be raised was raised by tions and by answer and the decree necessarily imports decision in favor of the plaintiffs on every question cessary to it.

Thus, the Petitioner is driven to make the extraordinary claim (p. 42) that although ordinarily a juris-

dictional question, and we are here dealing with so-called quasi, not strictly, jurisdictional facts, (*Stoll* v. *Gottlieb*, 305 U. S. 165, 176; *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 173, 174), once actually decided as a contested issue is *res adjudicata* in a subsequent proceeding, none the less, the rule may be overridden by a competing policy, such as the policy of "rehabilitating distressed farmers" involved in the *Kalb* case. This Court will, no doubt, be surprised to learn that in that case the law was made to yield to the policy of taking care of farmers. That policy, which was declared in the statute itself, was discussed only in dealing with the construction of the statute.

CONCLUSION.

The Petitioner asserts that the District Court was without jurisdiction to render the 1929 decree because of two facts which he claims the right to show by affidavit, regardless of what was at issue and adjudged in the suit, namely, (a) that Hermann Sielcken owned the claim in suit and that his ownership passed to his executor on his death, and (b) that he was an enemy within the meaning of the Trading with the Enemy Act. On the Petitioner's own theory the establishment of both of those facts is essential, even if he could establish them by evidence extrinsic to the record supported by affidavits alone.

Of the many reasons why the Petitioner's claim cannot prevail, the folowing will suffice, *viz.*:

First: The plaintiffs, concededly not enemies, alleged, in their bill of complaint, sufficient facts to entitle them to the relief afforded by the statute, including all the facts upon which the jurisdiction of the court depended.

The defendants, appearing generally, either admitted or nied those facts and pleaded other matter which they imed constituted affirmative defenses.

After a trial, participated in by all, a decree was en-ed expressly adjudging that Z.E.G. was "indebted to e plaintiffs" and awarding precisely the relief afforded the statute (R. 351).

The District Court had jurisdiction to decide every ques-n that did arise or could have arisen.

SECOND: The issue raised by the defendants' denial that E.G. was indebted to the plaintiffs and their assertion at Sielcken owned the claim and that his ownership passed his estate upon his death was expressly adjudged by the ree.

THIRD: The Court had jurisdiction to determine the stence, if any, of an ownership or interest in the claim, al or beneficial, which would have defeated a recovery whole or in part.

FOURTH: The legal owners were the proper parties to for the debt, being accountable after its recovery to all ing beneficial interests.

A beneficial interest even of an enemy would not have eated the plaintiffs' right of recovery (Point II, *supra*, 3), but even if it would have done so, either in whole in part, the District Court had jurisdiction to adjudge matter.

FIFTH: Even if the jurisdiction of the Court was de-dent on Sielcken's non-enemy status, that status was in issue, tried and necessarily adjudged by the 1929 ree.

The Circuit Court of Appeals said on that subject:

> "In oral argument before Judge Caffey, dismissal of the action was asked by counsel for the government on the ground that Sielcken was an enemy under the Act.
>
> "The issues thus raised are the same issues which are pertinent on the 'jurisdictional' question of right to sue under the Trading with the Enemy Act. Even if Judge Caffey was wrong in deciding these issues in favor of the plaintiffs the government should have taken an appeal from his decision if it wished to question it further. No appeal was taken and the merits of these questions cannot be now raised on a motion to vacate. No more is thus requested than a reconsideration of matters on which there was a full hearing. Once lost, the right to appeal cannot be regained in this circuitous manner." (R. 1124.)

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

LEONARD B. SMITH
and
SELDEN BACON,
Attorneys for Respondent.

NATHAN L. MILLER,
SELDEN BACON,
of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 75.—October Term, 1940.

Robert H. Jackson, Attorney General of the United States, on behalf of the United States, and as successor to the Alien Property Custodian, Petitioner,

vs.

Irving Trust Company, as Executor of Hermann Sielcken, deceased, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 6, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In a suit brought in the District Court of the United States for the Southern District of New York under Section 9(a) of the Trading with the Enemy Act,[1] a decree was entered on December 30, 1929, directing payment to the plaintiffs of a stated amount out of the property of a German corporation which had been seized by the Alien Property Custodian. There was no appeal and the amount awarded was paid.

In 1938 the United States moved upon affidavits to set aside the decree, contending that the court had been without jurisdiction. The District Court granted the motion upon that ground. 27 F. Supp. 44. The Circuit Court of Appeals reversed and reinstated the original decree. 109 F. (2d) 714. Certiorari was granted. 310 U. S. 621.

It appears that the suit had been brought in 1927 by John S. Sorenson and Thorlief S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken. The bill of complaint alleged that plaintiffs and Hermann Sielcken, the deceased partner, were citizens and residents of the United States; that the partnership had its principal place of business in New York City and had not at any time been a "resident" in enemy territory and had not been an enemy or ally of enemy within the meaning of the Trading with the Enemy

[1] 40 Stat. 411, 419, as amended, 42 Stat. 1511.

Act; that Zentral-Einkaufs-Gesellschaft, m.b.H., a German corporation described as Z.E.G., was indebted to Crossman & Sielcken for cargoes purchased by the latter for Z.E.G. during 1915 and consigned to neutral ports where it had been seized and condemned by the British Government; and that the Alien Property Custodian had assets of Z.E.G. which had been seized under the Trading with the Enemy Act. The bill prayed for a decree establishing the debt claimed by the plaintiffs and ordering its payment to them out of the property so held. The bill declared that it was filed pursuant to Section 9(a) of the Trading with the Enemy Act and that the court had jurisdiction to entertain it by virtue of the express terms of that provision.

The defendants, the Alien Property Custodian and the Treasurer of the United States appeared generally. They moved to dismiss the bill on the grounds (1) that it appeared affirmatively therefrom that no debt was owing to the plaintiffs from any enemy whose property had been seized and was then held, (2) that it appeared affirmatively that no debt was owing to the plaintiffs by Z.E.G., and (3) that the plaintiffs had not stated facts sufficient to entitle them to equitable relief under the provisions of the Act. The defendants also answered denying knowledge as to the averments of the bill which set forth the citizenship and residence of the plaintiffs and Sielcken and the *locus* of the partnership, and those concerning the transactions said to have given rise to the debt. As an affirmative defense, it was alleged that there were prior claims to the seized property of Z.E.G. The latter being joined as defendant also answered putting in issue allegations relating to the claim and setting up various affirmative defenses. One of these asserted that plaintiffs did not have title to the cause of action, since the Alien Property Custodian was alleged to have seized the assets of Crossman & Sielcken as an enemy firm because Sielcken resided in Germany and became an enemy. Other defenses of Z.E.G. averred that the partnership of Crossman & Sielcken had been dissolved through the outbreak of the war, and that the claim thereupon had passed to Sielcken and upon his death to his German executors who had entered into an arbitration agreement with Z.E.G., and that the arbitrators had found no liability on its part.

On the trial, at the close of the evidence on both sides, defendants moved to dismiss upon the ground that plaintiffs had failed to prove

their case. The District Court denied the motions and held that the partnership had not been dissolved by the outbreak of the war and that Z.E.G. was indebted as claimed; that the executors of Sielcken in Germany had no authority to dispose of a partnership asset which had come into existence long prior to our entering the war; and that plaintiffs were entitled to a decree for the relief prayed for. Decree was entered accordingly.

While the present motion to vacate the decree was upon the sole ground that the court had no jurisdiction to enter it, there was some attempt in the affidavits on the motion to show that the decree was collusive. But, as the Circuit Court of Appeals observed, there was no bill of review presenting such a question and no justification for setting aside a decree upon that ground merely upon affidavits. The Government expressly disclaims any challenge to that ruling. As to the question of jurisdiction, the Circuit Court of Appeals held that the District Court upon the trial of the suit was obliged to resolve disputed questions of fact and that its decision that the jurisdictional facts were established could not be attacked collaterally. *Stoll* v. *Gottlieb*, 305 U. S. 165; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371.

Petitioner thus states the question upon which review is asked in this Court: "Whether an unappealed judgment against the Alien Property Custodian under Section 9(a) of the Trading with the Enemy Act, on a claim to recover for a debt, may be set aside for want of jurisdiction on the ground that the beneficial owner of the claim sued on was an 'enemy' as defined by that Act".

Petitioner argues that the judgment was void since it was not authorized by the Trading with the Enemy Act and thus was a suit against the United States to which the United States had not consented and over which, therefore, the District Court had no jurisdiction.

We hold the argument untenable. There is no question here of the sort presented in *United States* v. *United States Fidelity & Guaranty Company*, 309 U. S. 506, of want of consent to be sued or of an attempt on the part of officials to waive the sovereign immunity. The United States had expressly consented in Section 9(a) of the Trading with the Enemy Act that suits might be brought by a non-enemy claimant to have his claim against an enemy debtor satisfied out of the latter's property held by the Alien Property

Custodian. The pertinent parts of the section are set forth in the margin.[2]

The statute provides that any person not an enemy or ally of enemy[3] "claiming" any interest or right in the property seized or to whom any debt may be owing by the alien enemy may sue the Custodian and Treasurer. He may sue "to establish the interest, right, title, or debt so claimed". The court is to determine whether his claim is established. If the claim is "so established", the court is to order the delivery of property or payment "to which the court shall determine said claimant is entitled". Nothing could be clearer than that in a suit so brought the court is to determine every issue necessary to the establishment of the claim.

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[2] "Sec. 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. . . .".

[3] Section 2 of the Trading with the Enemy Act provides:

"Sec. 2. The word 'enemy', as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory".

The suit in question was precisely within the terms of the Act. It was a suit by plaintiffs Sorenson and Nielsen as surviving partners, in which they alleged their citizenship and residence in the United States (and this does not now appear to be questioned), to recover a debt claimed to be owing to the firm by an enemy corporation. The allegations of the bill of complaint met the requirements of the statute in every respect. It set forth the plaintiffs' claim, their non-enemy status, the transactions out of which their claim arose, and that they had given notice of the claim as the statute required. The denials of the answers and the affirmative defenses presented issues which the court was competent to try. All these issues were necessarily before the court in the performance of its statutory duty to determine whether the plaintiffs had established their claim to the debt. Thus, the status of the plaintiffs, of the partnership, and of Sielcken, the deceased partner, the effect of his death, his interest in the assets under the partnership agreement, the nature of the transactions with Z.E.G., whether it was indebted to the firm and whether the surviving partners were entitled to recover the debt, that is, every issue which could be litigated in the suit was by the very terms of the Act submitted to the determination of the court.

Petitioner says that the jurisdictional point was not contested or adjudicated at the trial. That, while the defendants claimed that Sielcken was a resident of Germany at the time of the war, that he owned all the capital of the partnership, and that upon his death it was the duty of the surviving partners to pay over to his executor the capital, property and business of the firm, it was not suggested that these facts raised the jurisdictional issue. Petitioner urges that the District Judge held that while Sielcken may have been an 'enemy' as defined in the Act, 'he did not become an enemy within the meaning of the dissolution doctrine, at least so far as transactions occurring prior to the war were concerned'. And to support the argument, petitioner relies upon a colloquy between the District Judge and counsel in the course of the trial. Respondent rejoins that in the same colloquy the District Judge observed that 'the partnership agreement was between American citizens' and that it did not follow from the war and the provisions of the Trading with the Enemy Act that Sielcken was 'an alien enemy in the sense that a national of the country with which we are at war is an alien enemy'. And the District Judge further observed that the status

of the property in question 'had become fixed prior to the war' and that it was not a consequence of the war that the partnership was so far dissolved 'as to change the rights with respect to that property'. From any point of view, the colloquy affords no adequate basis for petitioner's contention. We agree with the Circuit Court of Appeals that when the dismissal of the suit was asked by counsel for the Government on the ground that Sielcken was an enemy under the Act, the issues thus raised were the same as those which pertained to the so-called 'jurisdictional' question of right to sue under the Trading with the Enemy Act.

By the provisions of that Act the jurisdiction of the District Court attached when the suit was brought upon the claim which the plaintiffs as non-enemy claimants set forth. However the issues were labeled the court was authorized to determine them. *Texas & Pacific Rwy. Co.* v. *Gulf, C. & S. F. Rwy. Co.*, 270 U. S. 266, 274; *Stoll* v. *Gottlieb, supra*, p. 171. And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 479; *Chicot County Drainage District* v. *Baxter State Bank, supra; Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 403. If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken.

The judgment of the Circuit Court of Appeals is affirmed.

Mr. Justice MURPHY took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.